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THE ENGLISH STATUTES IN MARYLAND

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THE ENGLISH STATUTES IN MARYLAND.

INTRODUCTION.

The study here presented, though itself forming a complete whole, is also a sequel to the former monograph, "Economics and Politics in Maryland, 1720-1750," etc. In that paper it was shown that these years of Maryland history, neglected by most writers, or regarded as quiet and uneventful, constituted really a period of great disturbance. This was on agricultural grounds, primarily, because the tobacco crop was so excessive that prices, fixed in England, became lower and lower, and the colonists were reduced to poverty. Consequently, violent attacks were made not merely against the Proprietor, but also against those classes whose incomes were derived from fees or salaries—the lawyers, the clergy, and the proprietary officers. After long wrangling over methods of betterment, the economic condition of the provinces was at length improved through limitation and regulation of tobacco planting, through the development of a more varied agriculture, and through the importation of a different sort of immigrants. During this period, also, there appeared as one of the leaders in many of these measures the elder Daniel Dulany, who first as a popular leader, and then as a proprietary officer, on the one hand laid the foundation for the power exercised in the next epoch by his sons and other relatives, and on the other devoted himself in more ways than one to the furtherance of the economic and political welfare of the colony.

Throughout a large part of this same period, or, to be exact, from 1722 to 1732, another controversy was heatedly

waged—that over the extension to Maryland of Acts of the English Parliament. This controversy, which was referred to very briefly before, constitutes, with its causes and results, the main subject-matter of the present essay. The bare narrative of the affair has been given by McMahon, and somewhat less satisfactorily by Mereness; but in neither case has the treatment been very broad, and the course of events in Maryland has not been set in due relation to the general history of Great Britain or the other colonies. It is the wider outlook attempted in this paper which must justify the repetition of some parts of the story that have been told before.

It will conduce to clearness if the order of treatment be outlined at the start. First, the development of the question in Maryland is carried down from the earliest times to the end of the royal government. Here, as the colony grows, we see the development of a legal system, twisted out of natural progress by peculiarities of the Maryland palatinate government. Then, leaving the discussion of Maryland, we trace briefly the legal doctrine declared by English judges and lawyers, the value of which, for purposes of comparison, is equaled only by the information derived from the experience of other colonies, parts of which receive some discussion. Next, the reader is brought back to the legislative history of the dispute, in the decade 1722-1732, and in the later phases to the present time. The narrative part of the work thus concluded, we turn to the more interesting consideration of the arguments in the debate, as exhibited in certain important documents. Lastly, inquiry as to the total effect of these arguments in their relation to English and American colonial history leads us to a résumé and conclusion.

While references to authorities are given in the notes, a brief bibliographical statement will be in order. The sources for these studies are found chiefly in the records of the Assembly of Maryland. For the greater part of the seventeenth century these have been printed in the Maryland Archives, but for the eighteenth century they are entirely in manuscript form, except for a few printed "Votes and Pro-

ceedings," usually incomplete. Next in importance are the Calvert Papers, mostly manuscripts, but in part printed. The manuscript matter in the Public Record Office in London is not so satisfactory for this as for some other periods of Maryland history. Other manuscripts have been examined in the library of the Maryland Historical Society, the Episcopal Library in Baltimore, and the library at Fulham Palace. Important also are the pamphlets of Dulany and others, and the files of the Maryland Gazette.

As guides, we have for Maryland McMahon, to whose judgment, though he wrote seventy years ago, we turn with respect, as do students of English history to the classics of the late Bishop of Oxford. The book of Mereness is of constant help, but contains minor errors as to this matter, and suffers from the lack of any comparative method. Besides these, several monographs in the Johns Hopkins Studies, and in the reports of the American Historical Association, especially those of Dr. Steiner, are to be consulted.

In Virginia there is, unfortunately, little that bears on the eighteenth century, to which period Bruce's valuable work does not extend. Ripley's Financial History covers that one side. For Pennsylvania we have followed Shepherd's monograph on the Proprietary Government of that Colony, and Lincoln's on the Revolutionary Movement. For Carolina McCrady's recent History, and for Jamaica the venerable work of Long have been our authorities.

The legal side has been followed out through Harris and McHenry's Maryland reports, the English reports, Chalmer's Opinions, Annals and Introduction, with Burge for the modern period, supplemented by the recent works of Egerton and of Snow. Frequent reference is made, also, to Reinsch's dissertation on the English Common Law in the American Colonies, which is very good as far as it goes.

With reference to the English statutes, the reader is reminded that we have written particularly concerning Maryland, and have introduced the experience of other colonies only to the extent of comparison. At some future time this

topic will be treated in its general development, in which very interesting and very different phases appear in New England, in the Central Colonies, in Canada, and in the West Indies. It will then be possible, also, to emphasize more than is here attempted, the relation of the matter to the Revolution and to the political ideas of that time.

Finally, the author must express his very sincere thanks to all those who, in the north and in the south, in America and in England, have extended to him their kind assistance. If he ventures any specification, his gratitude is due pre-eminently to the members of the departments of historical and political science in the Johns Hopkins University and in Smith College; to the Maryland Historical Society—especially to its Assistant Librarian; and above all to his mother, without whose interest and help the work of investigation would have been impossible.

CHAPTER I.

The Legal System in Maryland to the End of the Royal Government.

"It is observable," wrote Governor Hutchinson, "that all the colonies, before the reign of King Charles the Second, Maryland excepted, settled a model of government for themselves."[1] In this exception—for which the author vouchsafed no explanation—are reflected the turmoil of the history of Maryland, the vicissitudes of the proprietary government, and the constitutional struggles within the colony.

Among the very earliest of the many contests which mark the relations of the Proprietors and their colonists was one about the very foundations of government—"what laws the colony should be governed by." The sixth and seventh paragraphs of the royal charter gave to the Proprietor and his heirs the right

> "to ordain, make and enact laws, of what kind soever, according to their sound discretions, whether relating to the public state of the said province, or the private utility of individuals, of and with the advice, assent and approbation of the freemen of the said province, or the greater part of them, or of their delegates or deputies, whom we will shall be called together for the framing of laws, when and as often as need shall require, by the aforesaid now Baron of Baltimore and his heirs, and in the form which shall seem best to him or them . . etc."
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> The Proprietor could also issue "fit and wholesome ordinances from time to time." But these should not affect the "right or interest of any person or persons of or in member, life, freehold, goods or chattels." Further, in the charter is included the common limitation that all laws must "be consonant to reason and not be repugnant . . . to the laws, statutes, customs, and rights of this our Kingdom of England."

Dispute at once arose over the power of initiating legislation. The first settlers of Virginia had been subject to laws

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[1] Hutchinson: History of Massachusetts Bay, Vol. I, p. 94, note. The edition used purports to be the second, and bears date MDCCLX, but the preface shows that this should be MDCCLXIV.

made for them,[3] until a representative Assembly "broke out" in 1619; and later, under the royal government, the laws of Virginia were under the direct control of the crown. In Maryland, the second Assembly, that of 1637, refused to accept a body of laws sent over by the Proprietor and insisted on their own right of initiation, even if the results were very similar to those intended by the Proprietor.[3a]

At the first Assembly an act had been passed to establish for felonies the same penalties as in England, but this was now considered as no longer in force, and on the uncertainty, the Assembly proceeded against Claiborne and Smith by bills of attainder. For lesser matters Governor Calvert's commission authorized him to proceed according to the laws of England.[3a] During the first ten years of the colony's existence, in fact, whenever there was a lack of specific colonial precedent or law, and in cases which did not involve the loss of life, member or freehold, there was a tendency to refer to the law of England so far as applicable.[4] Then ensued a period when more discretion was given to the courts, and only specific statutes or customs of England were introduced by the legislature.[5] But after the Restoration matters took a more definite shape. In 1662 an act was passed, which, waiving the former distinctions as to crimes, provided that in all cases when the laws of the Province were silent, justice should be administered "according to the laws and statutes of England, if pleaded and produced." To meet objections expressed by the Upper House as to the inconvenience of the extension of all English laws to Maryland, the decision as to the right pleading and the consistency with the provincial welfare

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[3] Brown, A. The First Republic in America, passim. See index, s. v. Laws.

[3a] Maryland Archives. I. Assembly Proceedings, pp. 9-24.

[3a] Ibid, pp. 16-24. Bacon, Laws of Maryland, p. 6 and note.

[4] Maryland Archives. I. Ass. Pro. pp. 147, 183-4, McMahon p. 113. Mereness pp. 258-9. Reinsch p. 41. Bacon, Laws of Md.—Acts of 1642, summer, ch. 4; 1642; fall, ch. 2, 3.

[5] Maryland Archives. I. Ass. Pro. p. 210. Bacon's Laws of Md.—Act of 1646, ch. 2.

of the English laws involved was left with the courts.[6] This act Reinsch describes as "the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions and to rigid provisions deemed unsuitable."[7]

Then followed a period of uncertainty. If in 1681 the members of the Lower House appeared willing to recede from their demand for the English laws,[8] on other occasions they emphasized their right to them. In 1674, for example, a bill to fix definitely what original statutes should be in force in Maryland was lost by the opinion of the Lower House that the introduction of English statutes should be general.[9] Ten years later, when the troublous times of the Revolution were drawing nigh, upon another attempt of the Lower House to secure legal recognition of their desired end, the Proprietor commented at length on the danger of this idea and answered that he was willing to

"admit this alteration, that when the laws of this province are silent, justice may be administered according to the laws of England, if the Governor or Chief Judge and the justices of my court shall find such laws consistent with the condition of my Province. To a bill with this alteration will I set my hand, but not otherwise."[10]

Later still, and not long before the Revolution, the Lower House resolved—a procedure hitherto rare, but, as Mereness well points out, one that later became formidable—that they demanded "the benefit of the laws of England and of this Province as our inherent and just right."[11]

Thus early appeared an indefiniteness which, on the side of colonial law, at least, justifies the remark of Governor Hutchinson. For although the Assembly succeeded in maintaining

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[6] Maryland Archives. I. Ass. Pro. pp. 435-6, 448, 504. Mereness p. 261. McMahon p. 113. Bacon, Laws of Md.—Act of 1662, ch. 3.

[7] Reinsch, p. 42.

[8] In order to increase the power of the County courts at the expense of the Provincial Court.

[9] Mereness, pp. 261-262.

[10] Ibid., p. 264.

[11] Ibid., p. 264; and see Bacon, Laws of Md., Acts of 1663, ch. 4, and note; 1676, ch. 1, 2 and notes; 1678, ch. 15, 16 and notes; 1681, ch. 3; 1682, ch. 12.

its right of initiative, and passed acts for the Province, such legislation never amounted to a complete and inclusive code.[12] These provincial acts were often negatived by the Proprietor, and in time the Assembly—and especially the Lower House—claimed for Maryland the extension to the Province of not only the common law of England, but also the statute law of the mother country, in cases where no specific law of the Province applied. The former claim was before long admitted by the Proprietor;[13] and the common law, so far as applicable and unmodified, became a recognized part of the law of Maryland. The demand as to the statutes, however, was denied.

While the statutory doctrine was thus uncertain, the commissions issued to the judges were understood—at least, in after years—to refer to the Laws of England, or the Laws and Statutes of England, as supplying the deficiencies of the Province laws.[14] The difficulty was that these judges were proprietary officers, over whom the Assembly had little control, and that they might use their discretion arbitrarily. That this was not an imaginary danger is shown by the action of the Governor in 1677, when he declared that an Act of Parliament against nuncupative wills was in full force in Maryland,[15] while in Fendall's trial the English law of treason was applied.[16] Such measures as these were regarded by the Assembly as legislation without their consent; and in the expanded statement of grievances issued by the Protestant party in the Revolution we find these charges against the Proprietor emphasized:

> Making laws without the consent of the Assembly and extending them to the estates of the inhabitants.

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[12] Maryland Archives. I. Ass. Pro. passim. Steiner, Maryland's First Courts. American Historical Association Report, 1901, Vol. I, p. 222.

[13] McMahon. Historical View, pp. 113-116.
Reinsch, P. S. English Common Law in the Early American Colonies. Bulletin of the University of Wisconsin, No. 31 [1899].

[14] McMahon, p. 113. See also the documents referred to below.

[15] Sparks. Causes of the Maryland Revolution of 1688 [in Johns Hopkins University Studies, Series XIV.], p. 75, citing Lib. R. R., 158.

[16] Ibid. p. 86, citing III. Ass. Pro., pp. 313, 330, 332.

Assuming a power to assent or dissent when and to what laws he pleased, that are made in his absence from the Province.

Assuming a power to repeal laws by proclamation.

Assuming a power to dispense with laws made that had received his own personal assent.[17]

The appearance of these charges in the many laid against the Proprietary Government reinforces the opinion which the reader has doubtless formed ere this, that the fundamental difficulty in this matter, in the case of Maryland, lay in the control which the Proprietor could and did exercise over legislation. Into the justice or injustice of the specific indictments we have no need to go. It is certain that there had been bad government, and not the least of the unrest which made possible the Revolution of 1688 arose from the uncertainty of the law. The "model of government" in this respect, at least, was still unsettled.

The royal administration of the Province left in many ways lasting effects upon the destinies of Maryland. In legislation especially was this period noteworthy. But while the laws were revised and many excellent ones given a permanent place upon the statute book, no solution was found for this long standing and—we cannot help feeling—somewhat cherished opportunity for wrangling.

All the legislation upon this subject either expired or failed to pass.[18] From the commissions of the people, however, and from certain judicial decisions, it is manifest that the old claim of extension, in line with the principles of the Act of 1662, was not given up.[19] In the latter years of the royal

[17] Sparks, p. 105, citing III. Council Proceedings, pp. 215, 217, 219.

[18] The Act of 1692, ch. 36, revived that of 1678, but was repealed by the Act of 1700, ch. 8. See Bacon, Laws of Md. The Act of 1696, ch. 18, was interesting for this reason: the Assembly attached a clause implying the extension of the English statutes generally, and the Act was disallowed by the Crown as including legislation of a different nature from that set forth in the title of the bill. The bill was one of those for the establishment of the Church. See Economics and Politics, p. 18. This Act of 1696 was extended by Act of 1699, ch. 46, but both were dissented to by the Crown; see Bacon, Laws of Md.

[19] McMahon, pp. 119-120. Cases in 1707 and 1711 are mentioned in note 1. To these may be added others in 1712 and 1714, for which see 1 Harris and McHenry 28-30. In these latter cases, the decision was against the extension of particular statutes. See below, p. 32.

government, some English Statutes were definitely introduced by Act of Assembly, one of which was the English Act of Toleration [20]—and at the same time the Lower House came nearer a sensible solution of the difficulty than before; for at their command the Chief Justice, one of their body, drew up a list of statutes which were to be considered as extending to Maryland. But even after this had been revised and supplemented by the wish of others, this list was not legally adopted.[21] Later, after further resolutions by the Lower House, with no result,[22] in 1714 Governor Hart suggested, and the Upper House proposed to the Lower that the Assembly should request some of the Queen's counsel and others most eminent in the law to give their opinions as to what laws of England did extend to Maryland.[23] At this time and in this way the affair might have been brought to a reasonable and successful close—at least in so far as the past was concerned, but the Lower House postponed the matter; then shortly followed the restoration of the Province to the Proprietors, and nothing was done as to the general principle. An Act of 1715, however, required the court of the Judge or Commissary General for Probate of Wills and granting Administrations to proceed "according to the Laws of England now in force, or to be hereafter in force, within twelve months after such laws shall be published in the Kingdom of Great Britain, if pleaded before him, saving in such cases as by this present Act is provided." [24]

Such, in outline, was the development of this controversy down to 1722, at which time the latest and most important phase of it added strife over this matter to the many other difficulties of those years. At this point, we may suspend the narrative to inquire as to the principles involved, especially those found upon the side of the English courts, or in the experience of other colonies.

[20] Act of 1706, ch. 8. This also introduced the English Statute I, Jac. 1 ch. 11, against bigamy.
[21] Mereness, p. 266.
[22] Mereness, p. 267.
[23] 1714. Upper House Journal (MS.) June 28-29, July 1, 1714. Steiner, Restoration, p. 239.
[24] Bacon, Laws of Md. Act of 1715, ch. 39, § 2.

CHAPTER II.

The Legal Theory as to the Extension of English Statutes to the Plantations, and Some Practical Illustrations from Other Colonies.

The rapid expansion, in recent years, of the territory belonging to the United States, and the judicial determination, in the Insular Cases, of the relation of subject peoples to the American Republic have revived a question as old as the Constitution itself. This latest phase, involving possessions disconnected and far removed, makes us readier than before to examine the experience of other colonizing powers, especially of that British Empire from which the thirteen colonies separated themselves by the Revolution. At the present writing, moreover, the modern constitution of that empire is being subjected to fresh scrutiny and review, through the pressure of economic problems whose solution involves to the foundation the relation of Great Britain and her dependencies. But since, in the logic of history, the present has grown out of the past, a study which carries us back to the first building of that imperial system, and to the time when we were part of it, seems to be not unseasonable. Therefore, as our last chapter was local in its point of view, this is to be imperial in its outlook; and, leaving as beyond our proper field all considerations of economic relations, we shall inquire briefly into the theories held, in the seventeenth and eighteenth centuries, by English judges and lawyers, as to the legal status of the colonies, and especially as to the extension to these of Statutes of the British Parliament. Afterwards, for the purpose of comparison, we shall review the experiences of a few other colonies, which involved these theories or principles similar to those contested in Maryland.

We may first direct our attention to a case which was decided early in the seventeenth century, as a result of the union

of the English and Scottish monarchies in the person of James I. For details as to the desire of James to secure for his Scotch subjects the rights of citizenship in the richer land of the South, and the general history of the "Post-nati," we must refer to the historical writings of Gardiner and Hallam, and here direct our attention to a test case, known as Calvin's Case, made up in connection with the Post-nati decision that citizens of Scotland born after James' accession were to be accounted as legally naturalized in England. In Calvin's Case the Judges enunciated certain opinions as to the position of "dependencies" with relation to the central government. A dependency, they held, was a "parcel of the Realm in tenure," and Parliament might make any statute to bind such dependency, where the latter was definitely named; but without such special naming a statute did not bind.

At the same time the judges went into an extended classification of the dominions dependent on the British Crown. These they divided into

1. Christian countries to which the laws of England have been given by King or by Parliament.
2. Countries which come to the King through inheritance. In neither of these can the King "change" the laws.
3. Conquered countries inhabited by Christians. Here the laws of the conquered remain in effect until the King changes them,—which is entirely within his prerogative.
4. Conquered heathen countries at once lose their rights or laws by the conquest, "for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue." As to these, the monarch "by himself and such judges as he shall appoint, shall judge them and their causes according to natural equity . . . until certain laws be established among them."[1]

[1] 7 Rep. 17. We have followed the analysis in Snow: The Administration of Dependencies. The case was almost always cited whenever the question came up. Of especial interest is Lord Mansfield's brief consideration of it in the Grenada Judgment (Campbell v. Hall), 1774. His remarks were published in pamphlet form as Lord Mansfield's Speech on Giving the Judgment of the Court of King's Bench . . in the Case of Campbell v. Hall . . London, 1775; A New Edition, Corrected. He calls attention to the "absurd exception, as to pagans . . (which) shows the universality and antiquity of the maxim." The earlier history of these principles, before Calvin's Case, lies beyond our discussion. It may be noted, however, that they belong to International Law.

The year in which this decision was rendered (1607) marks the very beginning of successful English settlement in North America; but the principles then formulated were put into practice especially in the colonization of Ireland in this and in the succeeding reign.[2] For the ends of this paper, it is to be remembered as the first "leading case" that declared the distinction between conquered and settled dependent territories, and applied a different rule to these classes respectively.

As settlement in the new world progressed, and governments of one form or another were established by royal permission, or instruction, we find all the charters save one granting to the colonists the rights of English citizens, and the claim to these rights maintained by the inhabitants of every colony, whether in possession of a charter or not. As to the interpretation of these rights, and the determination of their extent, discussion and dispute were more or less continuous. Every colony, however, at some time during its constitutional history had to face this question of the relation of the colonial law to the legal system of the mother country. In our ordinary study we naturally emphasize the history of the English colonies on the Atlantic coast—and of only some of those—but occasionally we are led to other regions for our best sources of information.

The next important judicial decision was one that concerned the colony of Jamaica. The whole constitutional development of this island is of the greatest significance in American colonial history, and far too little attention has been paid to it. In this connection, especially, certain similarities and certain differences render very interesting a comparison with Maryland.

[2] The frequency of reference to the analogy of Ireland's law is noteworthy. See the matter upon the constitutional development in Ireland, in Hallam. The Constitutional History of England, ch. xviii. Compare, also, I. Blackstone's Comm. 103-4; Lord Mansfield's decision in Campbell v. Hall, quoted above; a pamphlet entitled The Privileges of the Island of Jamaica Vindicated, London, 1766 (rep.) A recent discussion of this whole matter is found in Snow, A. The Administration of Dependencies, chaps. 1-4.

The case of Blankard v. Galdy is one to which very frequent reference will be necessary. The matter at issue was a suit on a bond, and involved the extension of an English Act to Jamaica. The counsel for the plaintiff argued that Jamaica was an island beyond the sea conquered from the Indians and the Spaniards in Queen Elizabeth's time[3] [sic], that the inhabitants were bound by their own law, and that as they were not represented in Parliament, so they could not be bound by English statutes unless specially named. Statutes were cited—among them 5 Eliz. ch. 4, as to servants—which would be destructive if enforced there, and others, such as the Act of Usury, which does not apply, "for they allow them more for the loan of money than is permitted by that law." Several Acts of Parliament which have "taken notice" of Jamaica are cited.

Then is adduced the Earl of Derby's Case, where the Court held that English statutes did not bind the inhabitants of the Isle of Man, a conquered province, unless they were specially mentioned.

Counsel for the defendant argued contra that the liberties lost were those of the conquered; those that conquer cannot by this conquest lose their laws, which are their birthright, and which they carry with them wherever they go. Calvin's Case is then cited, with emphasis in its distinctions between heathen and Christian conquered countries. The experience of Ireland is used to point out an analogy between that and the situation of Jamaica.[4]

The Court held, in part:

1. In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there: so it seemed to be agreed.

2. Jamaica being conquered and not pleaded to be parcel of the Kingdom of England but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. . . .[5]

[3] The Conquest did not take place, of course, until Cromwell's time, in 1655. An attack was made in Elizabeth's reign, in 1596, under Shirley, but this was not followed up. See Preface to The Importance of Jamaica to Great Britain Considered: London, 1741? This tract deals rather lightly with Constitutional History.

[4] See below p. 28.

[5] 4 Modern 215 ff. Salkeld 411.

That Jamaica was alleged to be a conquered country caused upon other occasions, some of which we shall notice later, considerable difficulty in determining the legal system of the island. The decision, it seems, is adverse to the extension of English laws, though the judges did not lay stress on the distinction between common and statute law.

A clearer statement appears in the opinion of the Attorney-General, West, rendered in 1720, in which he said:

"The common law of England is the common law of the plantations, and all statutes in affirmance of the common law, passed in England antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes, made since those settlements, are thus in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear."[6]

Nine years later, in connection with the dispute in Maryland, Sir P. Yorke, then Attorney-General, gave an opinion on the same subject, which affords an interesting comparison with that of West.

"Such general statutes as have been made since the settlement of Maryland, and are not by express words located either to the plantations in general or to this Province in particular are not in force there, unless they have been introduced and declared to be Laws by some Acts of Assembly of the Province, or have been received there by a long uninterrupted usage or practice which may impart a tacit consent of the Lord Proprietary and of the people of the colony that they should have the force of a law there."[7]

The modification here evident was without doubt a reflection of the agitation in Maryland to which we shall devote extended discussion hereafter.

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[6] Chalmers' Opinions, Vol. I., pp. 194-195.

[7] Chalmers' Opinions, Vol. I., p. 206. Also in Calvert Papers (MS.) No. 52, p. 14. Chalmers dates this March 9, 1729. The Jamaican controversy referred to below had been settled in the meantime; while the controversy in Maryland had reached its height.

Passing over other cases, we come to the doctrine of the pre-revolutionary period as summed up by Blackstone,[8] who, upon this subject delivers himself as follows:

"Besides these adjacent islands [Man and the Channel Islands], our most distant plantations in America, and elsewhere, are also in some respects subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held[9] that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject[10] are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony. Such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what time, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature subject to the revision and control of the King in council: the whole of their Constitution being also liable to be new—modeled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the King may indeed alter and change these laws, but, till he does actually change them, the ancient laws of the country remain, unless such as are against the laws of God, as in the case of an infidel country.[11] Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what national justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there, they being no part of the mother country, but distinct, though dependent dominions. They are subject, however, to the control of the parliament, though (like Ireland, Man and the rest), not bound by any acts of parliament unless particularly named."

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[8] I. Blackstone's Commentaries (3rd ed. Cooley) Introduction, sec. 4, p. 107.

[9] Refers to Salkeld 411, 666.

[10] Refers to 2 Pere Williams 75.

[11] Refers to Calvin's Case, 7. Rep. 17. Shower's Parliamentary Cases 31 (Dutton v. Howell).

Lastly, the reader is referred to Mansfield's decision in the case of Campbell v. Hall.[12] Here the same general principles were stated more elaborately in six propositions, which need not be quoted at length upon the present occasion, as the time and place of the matter at issue lie too far from the limits described for this paper.

These opinions, judicial decisions, and the authority of Blackstone suffice to illustrate the legal theory with which we have to compare the claims put forth by the Maryland colonists. With the cases and decisions that come later, and with the modern classification of the British colonial system, we are not here concerned.[13] It must be remarked, however, first, that the opinions we have quoted show a process of development, and some lack of harmony; second, that while the principles as to extension which Blackstone lays down did, in American courts generally, become the accepted theory of the transfer of English law,[14] a different attitude was assumed towards his consideration of the American possessions as conquered territory; and thirdly, that as Reinsch has shown, the legal theory is not universally supported by the actual facts in the legal history of the colonies.[15]

As we have not undertaken any but the barest statement of this legal theory, so our reference to the experiences of other colonies must be of the briefest. While in every group of colonies incidents turned upon or called in question the same points as the Maryland controversy, and although no

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[12] 1 Cowper, 204. See also the pamphlet mentioned above, p. 18, n. 1.

[13] For a general discussion of the later development of the theory see Burge W., Commentaries on Colonial and Foreign Laws Generally, and in their conflict with each other and with the Law of England. London, 1838. Here will be found the story of the proclamations of 1763—the Grenada judgment, etc. For Canada and the Quebec Case, see also Coffin. The Province of Quebec and the early American Revolution. See also Egerton, H. E.; A Short History of English Colonial Policy, ch. iv.

[14] Van Ness v. Packard, 2 Pet. 137.

[15] Reinsch: English Common Law in the Early American Colonies, *passim.*

complete discussion of this part of the subject exists, we shall on this occasion mention only two or three such happenings which are peculiarly fitted to help us understand the more limited field that we have chosen.

In 1651 the Colony of Virginia surrendered to the Commissioners of the Puritan Government in England. The first article of capitulation declares:

> It is agreed and const'd that the plantation of Virginia, and all the inhabitants thereof, shall be and remain in due obedience and subjection to the Commonwealth of England according to the laws there established, and that this submission and subscription be acknowledged a voluntary act not forced nor constrained by a conquest upon the country, And that they shall have and enjoy such freedomes and priviledges as belong to the free borne people of England, and that the former government by the commissions and instructions be void and null.[16]

Here seems to be a conscious recognition of the "conquest" idea so emphasized in the decision just quoted. In Maryland itself, however, we have a still clearer example when, in 1684, in a debate between the Houses of the Assembly over the right of the Speaker to issue warrants for election to vacancies, the Proprietor's argument, in support of his own prerogative, that "the King had power to dispose of his conquests as he pleased," roused the ire of the Lower House, which asserted the rights of its members as based on their English origin. This was "their birthright by the words of the Charter." The word "conquest" had a sinister meaning which they resented, and they hoped that the words were the result, not of the Proprietor's own will, but of strange if not evil counsel. The Upper House at once explained that it had no idea of likening the freemen of the Province to a conquered people.[17] The discussion indicates that in Maryland, before the revolution of 1689, this legal theory was known and its application of this principle to Maryland denied.

The narrower question of the extension of the English stat-

[16] Hening: Statutes at Large I., p. 363-4. Cited in part in Snow: The Administration of Dependencies, p. 115, and as a whole in Hart: American History Told by Contemporaries I., pp. 235-6.

[17] Sparks, Causes of the Maryland Rev. of 1689, p. 82 Md. Arch. III. Ass. Pro. pp. 124-125.

utes had been broached in many other plantations. One or two instances will suffice for illustration. In 1692 the Assembly of South Carolina passed an Act authorizing the judicial officers of the colony to execute the Habeas Corpus Act—an Act passed some years later than the settlement of Carolina. This the Proprietors disallowed, however, declaring that all laws of England applied to the colony, and holding that it was therefore unnecessary to re-enact that famous statute in their Province. " By those gentlemen's permission that say so, it is expressed in our grants from the Crown that the inhabitants of Carolina shall be of the King's allegiance, which makes them subject to the laws of England."

Here we have a proprietary Province, of a constitution analogous in so many respects to Maryland, in controversy over this same matter; but the parties we find taking exactly opposite positions from that which they assumed, respectively, in Maryland. However, the Proprietors here receded from their position, and, in 1712, approved an Act which adopted the English common law and such statutes as were deemed applicable to the Constitution of the Province.[18] A somewhat similar law was passed in North Carolina, in 1715.

Of more direct bearing upon the course of events in Maryland is the experience of her northern neighbor, Pennsylvania, where legal controversies similar to that which we have to follow in Maryland were taking place just a few years before 1722. The efficacy of the English statute law, in comparison with that of local legislation, came up in connection with the unwillingness of the Quakers to take an oath, and their claim that an affirmation was equally valid for legal proceedings.[19]

More closely analogous to the issues developed in Maryland, however, was the evolution of the courts of judicature in Pennsylvania. In the course of a contest between Governor

[18] McCrady E. The History of South Carolina under the Proprietary Government, pp. 247-8, 517ff. Reinsch, English Common Law, pp. 49-50.

[19] Shepherd, W. R.: History of Proprietary Government in Pennsylvania, Columbia University Studies in History, Economics and Public Law, Vol. VI., pp. 351-369.

Evans and the Assembly, the former issued an ordinance to establish courts; in which the judges were directed to hear and determine cases "as near as conveniently may be to the laws of England, and according to the laws and usages" of the Province. In equity cases, they were to "observe" as near as may be the practice and proceedings of the High Court of Chancery in England. Against this establishment of courts by ordinance the Assembly remonstrated, but to little purpose, and the quarrel dragged on through subsequent administrations.[20] The constitutional points in dispute lie without the scope of our consideration, but the reference to the laws of England concerns us directly.

Furthermore, in 1718, Governor Keith and the Council fell out over the commissions of the judges. Should they run in the name of the Governor merely—as had been the case—or should they not rather run in the name of the King, with the Governor's attestation? In supporting the latter view, the Governor argued that the judges were the King's judges; and that the Proprietor had only the right of naming them, and he urged the example of Durham, where by Act of 27 Henry VIII. ch. 24, the power of appointment was taken from the Bishop and vested in the Crown.

"In reply," says Shepherd, "the Council stated that the difficulty had arisen in not distinguishing the difference between England and 'new colonies made without the verge of the ancient laws of that Kingdom.' As the King could give power to subjects to transport themselves to the dominion of other princes, where they would not be subject to the laws of England, so he might allow them to go to any foreign country upon any conditions he might choose to prescribe. Furthermore, since the native Indians, who inhabited these newly discovered American lands, were not subject to the laws of England, 'those laws must, by some regular method, be extended to them, for they cannot be supposed of their own nature to accompany the people into these tracts in America' any more than into any other foreign place. The King, by his charter, had given the proprietor and the people full power to enact laws not repugnant to those of England, but 'without extending any other than such as were judged absolutely necessary for the people's peace and common safety till such time as they should think fit to alter them.'"

[20] Shepherd: Proprietary Government in Pennsylvania, pp. 386 ff.

Continuing, they urged that precedent was upon their side in other colonies as well; and upon this occasion Keith yielded to their claims.[21]

Thus we see that public sentiment was on the side against extension. In line with this feeling, the Assembly, in 1718, passed an Act definitely extending several English penal statutes, which greatly altered the milder ideals of William Penn's early legislation. The necessity for this, Shepherd suggests,[22] was the advantage taken by many law-breakers of the privilege of affirmation instead of swearing oaths. In the passage just cited, the argument was not technically legal, but in the preamble to this Act the Assembly said:

> "Whereas it is a settled point that as the common law is the birthright of English subjects, so it ought to be their rule in British dominions; but Acts of Parliament have been adjudged not to extend to these plantations, unless they are particularly named in such acts."[23]

Here is a clear-cut statement of the "orthodox" theory as to extension, exactly similar in tenor, it will be noticed, to the opinion of West in 1720, given above. Since it is easy to prove that contact between Maryland and Pennsylvania was continuous, and that the politics of the latter exerted a decided influence on those of the former, it is not unreasonable to suppose that this discussion in Pennsylvania, which occurred when discussion on the same point in Maryland was inactive, had something to do with the revival of the quarrel in Maryland in 1722. This hypothesis is helped by the emphasis that we shall find laid by Dulany and his party on the Commissions of the Judges. It is the more remarkable, as the latter argued precisely in opposition to the ideas of the Council in Pennsylvania.

A far more striking analogy appears in the history of Jamaica, to which the case of Blankard vs. Galdy has already led us. We found it there claimed and adjudged that Jamaica

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[21] Ibid., pp. 386-7.
[22] Ibid., pp. 388-389.
[23] Ibid., p. 390.

was a conquered Province; but, as we might suppose, the English inhabitants of the island denied that they represented the conqueror. The military seizure of the island and its cession by Spain did, however, introduce this additional complication into the whole of Jamaica's constitutional history. Moreover, Jamaica was a Crown colony, and had no charter. The instructions and proclamations of Cromwell and of Charles II. were liberal, however. In the time of the latter, especially after the period of military rule had reached a conclusion, the progress of the colony towards a constitutional development like that of the other American colonies was constant. But in 1678, upon objections by the lords of the Committee for Trade, the royal government rejected some of the Jamaican laws, and went so far as to urge that the laws for the island must be made in England, then sent to Jamaica for passage by the Assembly, after the manner of Irish legislation under Poyning's Law.

This reactionary attempt of the Crown to compel the civilian was opposed and rejected by the Jamaican Assembly. Then ensued a long wrangle, which left it in great doubt what laws were in force and what not. A temporary agreement as to the practical difficulties was reached in 1684. But the claim of the colonists to the English laws—not only to those passed before the settlement, but to some, like the Habeas Corpus Act, passed after it—was denied by the King in Council and by the courts.

The Jamaica Assembly went farther than that of Maryland, in that they entangled with this controversy the question of levying the public money, and refused to pass a law to grant a perpetual revenue until the Crown would fully admit the rights they demanded. This the Crown for a long time refused to do; but at last, in 1728, the Assembly

"Settled a permanent revenue, not burthensome to themselves. . . . In return for this they obtained the royal confirmation of their most favourite and necessary Acts of Assembly, and the following declaration expressed in the 31st clause of this revenue Act.

"And also all such laws and statutes of England as have been

at any time esteemed, introduced, used, accepted or received as laws, in this island, shall and are hereby declared to be, and continue, laws of this his majesty's island of Jamaica forever!

"This clause is justly regarded by the inhabitants as the grand charter of their liberties, since it not only confirmed to them the use of all those good laws which originally planted and supported freedom in England, but likewise of all the other provisions made for securing the liberty and property of the subject in more modern times; when, upon the several overthrows of tyrannic powers in that Kingdom, the subjects' rights were more solidly fixed on the rational basis of three solemn compacts between the sovereign and people: at the Restoration of Charles II., the Coronation of the prince of Orange, and, lastly, the accession of the House of Hanover.

"The little clause before recited has cost the island, in fifty years, about £50,000, the net income of the revenue being about £10,000 *per annum*. Yet, considering the unspeakable benefits derived by them in virtue of this compact, they do not think it too dear a purchase." [24]

Such was the controversy in Jamaica, thus contemporaneous in part with that conducted by Dulany in Maryland. That the Jamaican affair was studied in Maryland will appear below, where we shall find the Proprietor, in 1724, citing the failure of the Jamaicans in one of their attempts to get their English laws. Five years later, in the Maryland Gazette, a letter from Jamaica announces the probability of an agreement. This Act "has been at home near a year" and "cannot well fail of being confirmed, being exactly conformable in the substance to the draught sent hither from home." [25]

At the time, therefore, when Dulany began his decade of agitation in Maryland, there was, in the first place, a theory or tradition established in the English courts; a tradition not yet distinct, but approaching definiteness. Secondly, there had been frequent occasions in other colonies where the

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[24] Long, Edward: The History of Jamaica, London, 1774. Vol. I., pp. 219-20. The account of Jamaica as a whole is based on the Appendix to the Tenth Chapter of Long's very valuable work; on a pamphlet entitled The Privileges of the Island of Jamaica Vindicated—reprinted in London, 1766, with an appendix; and on the opinion of Yorke and Wearg, the Attorney and the Solicitor-General, as to the legal constitution of Jamaica in 1722-25, Chalmers' Opinions (Colonial. Edition of 1814, Vol. I., pp. 204-224). See also Lord Mansfield's decision in Campbell v. Hall.

[25] Maryland Gazette, June 10-17, 1729. The Jamaican letter is dated March 5.

relations to the legal system of the mother country were matters of dispute. Lastly, the uncertainty in Maryland was as old as the colony. With these points in mind, we may perhaps sympathize with "An American," who in "An Essay on the Government of the English Plantations," published at the beginning of the eighteenth century, voiced his complaint that

"No one can tell what is law and what is not in the plantations. Some hold that the law of England is chiefly to be respected, and, when that is deficient, the laws of the several colonies are to take place. Others are of the opinion that the laws of the Colonies are to take the first place and that the laws of England are in force only where they are silent. Others there are who contend for the laws of the colonies, in conjunction with those that were in force in England at the first settlement of the colony, and lay down that as the measure of our obedience, alleging that we are not bound to observe any late acts of parliament in England except such only where the reason of the law is the same here that it is in England."[34]

[34] Quoted in Lincoln: The Revolutionary Movement in Pennsylvania, pp. 117-118. Compare also the section on the Civil Jurisdiction in a Short Discourse on The Present State of the Colonies in America. This pamphlet is No. 6 in A Collection of Papers and Other Tracts, by Sir William Keith, London, 1779 (2nd ed.). This pamphlet, No. 6, was presented to the King in 1728, and thus is contemporary with the struggles in Maryland and in Jamaica.

CHAPTER III.

The Ten Years' Controversy, 1722-1732, and the Final Position of the English Statutes in Maryland Law.

The ten years, 1722-1732, constitute the most important phase of the controversy over the English statutes. Back of the strife over this particular matter lay the general state of the public mind, which has been described at some length in the paper, "Economics and Politics in Maryland." In contrast with most of the issues then agitated—which to a large degree were connected with agricultural discontent—this was a question in which no material profit or loss was involved. It was purely legal, and the endeavor was to establish as a general rule what in some particular cases was not denied. A review of the circumstances then existent shows how favorable the opportunity was for political leadership; and that such leaders were forthcoming in the lawyers of regular training who, in spite of the Assembly's jealousy as to their pecuniary emolument, were then leading that body to one end or another.

The man who stirred up this matter fresh and gave to it the legal talents which won him place and fame was the Attorney-General of the Province, Daniel Dulany, the elder. For his career in respects other than this, the reader is referred to the former paper. He began his service in the Assembly in 1722, and at the same session, as head of the Committee of Laws, made the conduct of this controversy with the Proprietor his especial charge. In 1732 the dispute closed with a compromise, and the next year Dulany went over to an official career in the service of the Proprietor and no longer supported the country party. Meanwhile, through a routine of resolutions, addresses, reports, bills and proprietary vetoes the country party was kept united and insistent—for this purpose, at least—by an able and industrious commander.

It is necessary first to outline the legislative history of these years, then to trace at greater length the arguments urged in support of the position of the popular party—arguments which are found in documents largely by Dulany's hand or evidently inspired by him. Then the effects of these developments on later times will be related and described.

In 1712, a decision of the Provincial Court [1] had denied the extension to Maryland of one of the English Statutes of Limitation, 21 James I., ch. 16. Now, in 1722, the Assembly passed an Act definitely adopting this statute; but with the addition of language which declared the general extension of the English statutes.[2] This principle the Lower House now prepared to defend.

On October 25, it was proposed by a member, and resolved [3] by the House (1) that the standing Committee of Aggrievances should have likewise the character and duties of a Committee for Courts of Justice; (2) that they should be instructed to examine the commissions of the several justices, to ascertain whether any alterations or omissions had been made on the part of the commissions which directed the judges to try and determine cases before them according to the laws, statutes, ordinances, and reasonable customs of England and of this Province; (3) that they should examine also the phrasing of the oaths of office taken by the several magistrates and discover whether these oaths contained a form here declared to be necessary; (4) that these resolutions should be perpetuated by giving a copy of them to the committee at the beginning of every session. Then followed yet more impor-

[1] 1 Harris and McHenry, pp. 28-29. Philemon Lloyd's Lessee vs. Vincent Helmsley. The jury returned a special verdict, depending on the Court's decision as to the extension. The same situation is found two years later in July Term, 1714, in Wm. Clayland's Lessee vs. Daniel Pearce, 1 H. & M. 29-30. Here the Act of 29 Charles II., relating to frauds and perjuries was involved. The court again decided against the extension.

[2] Bacon: Laws of Md. Act of 1722, ch. 19.

[3] These resolutions may be found in the Manuscript Journal for that date; or more conveniently in the printed Votes and Proceedings published in 1725, pp. 2-3. They are given in full in the Appendix to this paper.

tant resolutions—to which constant reference will be necessary—which declared (5) that the Province was not under the circumstance of a conquered country; that if it were, the present Christian inhabitants were the conquerors, not the conquered; but that not even against the Indians was conquest the method of settlement. On the contrary, the lands were purchased—(6) that this Province had always hitherto had the common law and such general statutes of England as were not restrained by words of local limitation, and the Acts of Assembly—subject to the same rules of construction as those used by the judges in England. These rules had received the Proprietor's approval by the commissions given to their judicial magistrates except where such words had been casually or carelessly omitted; that whoever advised his lordship or his successors to govern by any other rules were evil counsellors— and (7) that these resolutions were not occasioned by any apprehension of infringement of their principles by the proprietors, but had the intent of informing their posterity as to the nature of their constitution.

The Upper House postponed consideration of these resolves, on the plea that they desired to consult the Attorney-General concerning them, and did not give their approval until two years later.[4]

Not many days later the session came to an end. When the Assembly next met, the Governor communicated to them[5] the dissent of the Proprietor to the Act of 1722. The letter of veto bore date of March 19, 1722 [3], and further required that this dissent should be recorded. The Governor was instructed, also, not to allow the passage of any Act for the introduction "in a lump" of the English statutes, which had always been held not to extend to the plantations unless by express words located thither. Any one or more found convenient for Maryland should be enacted *de novo,* in whole or in part.

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[4] U. H. J. MS., Nov. 4, 1722. See below, pp. 34-5.
[5] L. H. J. MS., Sept. 25, 1723.

In response, the Lower House appointed James Stoddart, John Beale, and Daniel Dulany as a committee to examine into the provincial records and report on the facts as to the practice of extension in the past.[6] The committee reported October 18, asserting that precedents in favor of their position were ample, and basing their assertions on four kinds of evidence: the royal charter, Acts of the Provincial Assembly, commissions and instructions to officers, and judicial proceedings.[7] The Assembly followed this report by the adoption of an address to the Proprietor[8] which combated the principles enunciated in his instruction to the Governor, and developed the counter-claims made by themselves. Of this address an outline will be given hereafter.

With the session of 1724 the Lower House seems to have removed its contention from the Statute of Limitations to the broader and somewhat less definite ground of the judges' oaths. Upon the advice of the Committee of Grievances[9] the Attorney-General was instructed to prepare a form of oath which should be consistent with the principles expressed in the resolutions of 1722. This form he presented October 13.[10] When this went to the Upper House for consideration, the expression that the rule of judicature should be "according to the laws, statutes, and reasonable customs of England, and the Acts of Assembly and the usage of the Province," aroused criticism from that body, because it gave to the judges the power arbitrarily to select what statutes and customs were suitable. After considerable bickering the houses agreed to change the latter part of the phrase so as to read Acts of Assembly, usages, and constitution of the Province.[11] Even thus the bill did not receive the Governor's assent. One result of the discussion between the Houses was the approval

[6] L. H. J. MS., Sept. 30, 1723.
[7] Printed Votes and Proceedings, pp. 10-11.
[8] Oct. 21, 1723. Ibid. pp. 17-22.
[9] Printed Votes and Proceedings, p. 39, Oct. 8.
[10] Ibid. p. 40.
[11] Ibid. p. 64.

by the Upper House of the resolutions passed by the Lower in 1722. Perhaps the most noteworthy document was another historical retrospect presented by the Committee on Grievances, which discussed especially the judges' oaths from 1692 to 1724,[12] and a letter written to the Governor by Dulany, to whom, as Attorney-General, the former referred the wording of the clause in the proposed oath, for his opinion as to its constitutionality.[13] It is impossible to believe that Dulany's leadership in the Lower House was not known, consequently the whole situation seems somewhat ludicrous.

The next Assembly—a new one—met in October, 1725, and made a violent attack on the privileged classes—the lawyers, the clergy, and the proprietary officers. The year was no less noteworthy in the statutes controversy. Perhaps as a campaign document for this Assembly, there was published in Philadelphia, by Andrew Bradford, a Selection of the Votes and Proceedings of 1722-4, bearing on the statutes controversy and the constitution of the Province, to which were prefixed, first, a translation of the charter of Maryland, and, secondly, a long anonymous "Epistolar Preface to the Maryland Readers,"[14] which urged the colonists to appreciate their his-

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[12] L. H. J. October 18th, 1724.

[13] U. H. J. Oct. 31, 1724. "May it please your Excellency. The words proposed in the oath of a Judge (for the Letters of the King) being designed only to oblige the Judges according to the known and established rules of law without regarding any commands or other directions (even the King himself) to the contrary, I'm humbly of opinion can't possibly affect his Lordship, in his prerogative or any other way, but on the contrary shew that regard to the equal and indifferent administration of justice to the people in putting the judges under the most sacred tyes to discharge their duty that is one of the distinguishing characteristics of a good ruler. May it please your Excellency, Your most humble servant,

D. DULANY."

[14] This "preface," the general character of which makes it seem probable that it was written by Dulany, speaks first of the lack of publication of the "parliamentary proceedings" of Maryland, and the resulting ignorance of the constitution of the Province, which makes "the character of a great Commoner, so much esteemed in England . . . here unknown, or useless." The author then vigorously combats the charge of innovation which has been brought against his party. On the contrary they are striving for the rights the Province has always had, which are English liberties.

toric rights and liberties, and indulged in a slap at the clergy. The appearance of the printed pamphlet in politics, the connection with Pennsylvania where party strife at this time was so active, and the language used—all are very significant.

The Governor opened fire[35] with a long letter from the Proprietor, which he supplemented by some remarks of his own. The Proprietor's brief was in effect an answer to the Assembly's address of two years before, and declared that the ideas of the Lower House as to the extension of English laws were wrong. Jamaica precedents were cited, and the colonists were urged to enact for themselves the English statutes they wanted. Finally the Proprietor exhorted them to peace—to stop quarreling with the Upper House over the latter body's salary as a council.

In answer the Lower House readopted the resolution of 1722; then the Committee of Laws, headed by Dulany, brought in another address, which for legal ability shown in its composition is perhaps the best of the whole group. Adopted by the Assembly,[36] it emphatically reasserted to the Proprietor the position of the popular party. Of this, as of the Proprietor's letter, detailed description will be reserved till later. Besides this manifesto of the Lower House, the Upper, also, now presented an address to Lord Baltimore.[37] This fact indicates that Dulany had really commanded the attention of the people of the Province of higher as well as lower estate. Thus in agreement the two houses passed an-

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To those who wish specific information as to these is recommended "the little book last published, entitled 'English Liberties.' Next is presented, as a quotation, a letter signed 'Sebastian,' addressed to a clergyman, in which the cause of the irreligion that exists is laid to the want of belief in revealed religion. It is hinted also that the clergyman should set a better example in his own life; and to him is recommended the little book entitled 'A Short and Easy Method with the Deists.' These two books are recommended to those gentlemen who send yearly to England for their goods, 'even if they send for five or six ounces of tea the less.'" "English Liberties" was written by Henry Care, in or before 1719, and "A Short and Easy Method" is the work by Leslie.

[35] L. H. J. MS., Oct. 5, 1725.

[36] L. H. J. MS. Oct. 8.

[37] U. H. J. MS. Nov. 5, 1725.

other oath bill, which the Governor approved, but which, shortly after this, was vetoed by the Proprietor.[18]

A year seems to have passed without further developments of importance. Then, in 1727, we find another printed edition of Votes and Proceedings; this was printed at Annapolis, by William Parks, and included chiefly the transactions of 1725—another report of the Committee of Aggrievances, another discussion between the Houses, another Act passed, and another veto.[19]

Then came three years of excitement, the last of Governor Calvert's régime; the events of which have been described in the first two chapters of the former paper. Besides the political strife, the appearance of the Maryland Gazette and other publications may be recalled. During this same period the statutes controversy reached its crisis, and shortly after, its conclusion. To the Assembly, upon its meeting, was announced the dissent of Lord Baltimore to the Oath Law of 1727, and, as if to meet them half way, offered the Proprietor a form of oath which he suggested as more appropriate. This read "according to the laws, customs, and directions of the Acts of Assembly of this Province, and, when they are silent, according to the laws, statutes and reasonable customs of England as have been used and practised in this Province."[20]

The Lower House would have none of this, because of the obnoxious past tense of the words "have been." By such words they would be shut out from future statutes which might be of benefit to them,[21] and from past statutes which might perhaps not have been "used and practised" before a court, while endless disputes might arise as to whether any particular Act had been used. Again, Dulany and the Committee of Laws made a report; again, the former drew up for the House an address to the Governor. Another law and

[18] Bacon: Laws of Md. Act of 1725, ch. 1.
[19] L. H. J. MS., 1727, passim. Bacon: Laws of Md. Act of 1727, ch. 1.
[20] L. H. J. MS. 1728, Oct. 4.
[21] L. H. J. MS. 1728, Oct. 5.

another veto followed.[22] In view of this third dissent in this one matter, and not to speak of the numerous negatives to other laws of the same period, we are not surprised to find the Lower House passing a resolution against the use of this power,[23] a power which, we must remember, the Crown had ceased for some time to employ in England. This had no effect, apparently, upon the Proprietor, for a fourth attempt to find a form agreeable to him met with the same treatment. This was an Act of 1730, in which the words ran "according to the reasonable customs of England and the laws and statutes thereof as are or shall hereafter be enacted agreeable to the usage or constitution of this Province." He was specially urged by both Houses to assent to this, but to no avail.[24]

Meanwhile had appeared from the press the most important of all the writings which the controversy drew forth. This was Dulany's "The Right of the Inhabitants of Maryland to the Benefit of the English Laws," and to it we shall hereafter devote separate consideration. A comparison of dates makes it not improbable that to the agitation of these years, and, perhaps, to the influence of Dulany's pamphlet, is to be ascribed the somewhat more liberal opinion of Yorke, in 1729. This, as we noted in the preceding chapter, contains in its phrases a distinct air of concession.

The next year brought to the government the good sense of Samuel Ogle. No wonder that he wrote home to tell Lord Baltimore that the country was "as hot as possible about the English statutes and the judges' oath,"[25] or that he recommended giving places to "Bodeley and Delany."[26] Before this, the uncertainty in the matter had led to great confusion, some officers taking one form of oath, others another. Now some refused to take any.[27] In 1731 another oath bill was

[22] L. H. J. MS. 1728, passim. Bacon, Laws of Md., Act of 1728, ch. 1.
[23] L. H. J. MS. 1729, Aug. 5.
[24] Ibid. 1730, passim. Bacon, Laws of Md., Act of 1730, ch. 1.
[25] Calvert Papers (printed), Vol. II., p. 82.
[26] Ibid. p. 85.
[27] Mereness, p. 276.

passed, but the Governor withheld his consent.[28] Next year he carried into this controversy the same conciliatory policy which he made his general rule of conduct; told the Assembly that "the Proprietor and the country aim at the same thing"—the good of the Province; and then accepted a bill which, drawn in a joint conference,[29] was accepted by all parties and became and remained law.[30] In this law the important phrases of the oath ran as follows:

> "You shall do equal law and right to all the King's subjects, rich and poor, according to the laws, customs and directions of the Acts of Assembly of this province so far forth as they provide; and when they are silent, according to the laws, statutes and reasonable customs of England, as used and practised within this province."[31]

When Charles Lord Baltimore, next year, visited the Province, and, for a while, ruled in person, he permitted Governor Ogle's law to stand; and as he went out of his way to placate the opposition, and detached many of the leaders, including Dulany, by giving them places in the governmental system, an epoch of good feeling existed for awhile.[32] This was short-lived, and soon new or old causes of strife again made relations between Proprietor and people somewhat strained. The extension of the statutes, however, never again became the subject of continued contention. If the Proprietor did not withdraw his instructions to the Governor not to pass a bill for general introduction of the statutes, the Lower House did not repeal or withdraw their resolutions; and from time to time declared that same statute was in force.[33]

What, then, was the outcome of this long and tiresome controversy? At first sight—nothing! But for answer, let us quote the opinion of the judicious McMahon, who looked at this whole question with sympathetic and calm insight:

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[28] Ibid.
[29] L. H. J. MS. 1732, July 22. Dulany heads the list of members representing the Lower House.
[30] L. H. J. MS., July 31, 1732. Act of 1732, ch. 5.
[31] L. H. J. MS., July 22, 1732. Bacon, Laws of Md., Act of 1732, ch. 5.
[32] Economics and Politics, ch. ii., end, and ch. iii.
[33] Mereness, p. 211; L. H. J. Oct. 18, 1753.

"The controversy thus terminated in partial submission to the will of the proprietary, but the Lower House had accomplished all their purposes. They had not only brought about a recognition of their right to such of the statutes as had been adopted in the practice of the province; but they had also couched this recognition in such general terms, as to permit the future introduction of English Statutes. The words "*as used and practised*" in this act, might relate either to what had been the usage and practice of the province in adopting English statutes, as a practice sanctioned and to be continued, or to the previous use and practice of these statutes as a test of their applicability; and even if the latter construction were adopted, the practice which was to give them efficacy, was not by the express terms of the act a practice anterior to its passage, but only to the time of the application of the statute as a rule of judicature. This subterfuge accomplished all its purposes; for from that period to the revolution, the courts continued to exercise the power of adopting and giving effect to such statutes as were accommodated to the condition of the province without regard to the enquiry whether they had been practiced upon or enacted previously to the Act of 1732." [34]

Here, however, McMahon does not sufficiently emphasize the fact that difficulty might arise from the old uncertainty as to what statutes had been used and practised. This difficulty, of course, was not so great as in the earlier days, because the legislation of the Assembly had attained so much more towards completeness. It was felt, however, as Mereness points out,[35] in the criminal law, who cites a communication made to the Lower House in 1771 by Governor Eden. From this we learn that some persons convicted on some English statutes had been discharged with impunity, because the extension of these was doubted, with encouragement to crime as a result.

With the Revolution the authority of the British Government came to an end. But, when a new constitution was to be formed, the old question presented itself in a retrospective manner. The fondness for English precedents still remained, and the Bill of Rights, sec. 3, declared that the inhabitants of Maryland were "entitled to the benefit of such English statutes as existed at the time of the first immigration and which

[34] McMahon, pp. 127-128.
[35] Mereness, Maryland, p. 277. Steiner: Life and Administration of Sir Robert Eden, Johns Hopkins University Studies in Historical and Political Science, Series XVI., p. 48 [382].

by experience have been found applicable to their local and other circumstances and of such others as have since been made in England or Great Britain and have been introduced, used, and practised by the courts of law or equity."

But just which statutes were these? This period of transition, it seems, should have been just the time to prepare a list of those that had been applied or were applicable. In the neighboring State of Virginia the work of Thomas Jefferson and his associates [36] was gradually embodied in a code, the contents of which included a selection of English statutes which were declared to be adopted and in force.

In Maryland the old state of things remained. Between then and the time of McMahon's book, various resolutions had passed in the Assembly looking towards the establishment of greater definiteness. The chief result was the collation made by William Kilty, the Chancellor, in pursuance to a resolution of 1809. Kilty's work classified the English statutes, from Magna Charta to 1773, into (*a*) those not applicable, (*b*) those applicable but not proper to be incorporated into the statute law of the State, and (*c*) those both applicable and proper to be incorporated. This collection was helpful because of its information, and as these statutes were not formally adopted by the Legislature, Kilty's book came to be regarded as an authority in this direction. As the Court said, in Dashiell v. Attorney-General, it was "a safe guide in exploring an otherwise very dubious path."

McMahon refers also to a chart prepared by Alcæus B. Wolfe, of Baltimore, which attempted to illustrate the statutes fit for incorporation.[37] The text of the statutes found "applicable and proper" by Kilty was edited with copious and scholarly notes by J. J. Alexander,[38] wose work in default of

[36] Jefferson's Writings (ed. T. J. Randolph, 1830), Vol. I., pp. 34 ff. The Writings of Thomas Jefferson (ed. P. L. Ford), Vol. I., pp. 58-60. [37] McMahon, p. 130.

[38] Alexander J. J. A Collection of the British Statutes in Force in Maryland according to the Report thereof made to the General Assembly by the late Chancellor Kilty, with Notes and References to the Acts of Assembly and the Code, and to the principal English and Maryland Cases: Baltimore, 1870.

legislative adoption is accepted as very influential by the courts of Maryland. So that McMahon's conclusion is still true. "The English statutes thus introduced by colonial usage, and resting upon it alone for their efficacy even at this day, may truly be called the *common law of Maryland.*"[39]

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[39] McMahon, p. 131. The history of the Adoption of English Law in Maryland since 1776 is given in an article by Bernard C. Steiner in 8 Yale Law Journal 353 (May, 1899). The Constitution of 1851 claimed the "benefit of such English statutes as existed on the fourth day of July, 1776; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law and Equity." The Constitutions of 1864 and 1867 repeated these words. It will be noted that the two classes of statutes referred to in the Constitution of 1776 have been reduced to one.

We may also note that in the case of the State v. Buchanan (5 H. & J. 356) the Court claimed that the settlers were "in the predicament of a people discovering and planting an inhabited country" and that they were neither conquerors nor conquered. Further decisions on this point in the Maryland courts are discussed in Steiner's article.

CHAPTER IV.

The Arguments in the Debate of 1722-1732.

If the sources for the eighteenth century history of Maryland, or even that part of them found in the Journals of the Assembly, were accessible in printed form, this chapter could be materially abbreviated. But the documents which illustrate the arguments pro and con in the controversy just outlined exist almost exclusively in manuscripts and, as these arguments are the life of the dry narrative that constitutes the last chapter, we must endeavor at this point briefly to sum up several of the more important.

We shall consider, then, first, a few reports and addresses which appear in the records of the Assembly; second, to show its relation to these, the pamphlet by Daniel Dulany; and third, the notes upon the controversy found in the writings of one of the ministers of the Established Church in the colony of Maryland.

First among the documents which present the arguments of the country party come the Resolutions of 1722. These we have already outlined. The most important are those of the second group, which present a clear statement of the claim that the colonists had in the past enjoyed the extension of the general English statutes—that is, those not restrained by words of local limitation; and the paragraph to which special notice should be given is the one which emphasizes the idea that the Province was not a conquered country even as against the Indians; while, if it were, the English inhabitants would be the conquerors, not the conquered.[1] But part of the resolutions of 1722 provide for their perpetuation; they have a further history that will be discussed hereafter.

In reply to this, we have the statement of the Proprietor,

[1] Above, pp. 32-33. For the resolutions in full, see Appendix I.

based on the authority of the courts, which flatly denies the popular assertion.[3] Thus the argument begins with these expositions of the respective parties.

Then follows the report of the special committee to examine the records, which tells the Assembly that precedents in favor of their view abound. They quote the royal charter, though here they rather miss the point; the Acts of Assembly, commissions and instructions to officers — a constant source of argument throughout the rest of the controversy — and judicial proceedings.[3] Following this report, the Lower House adopt their first address to the Proprietor.[4] To this a few more words may be devoted.

With reference to the Act of Limitation, the country party seemed to be lacking in precedents; they argue back, therefore, to the general thesis that it must extend because it is not limited. In support of this general proposition, we find the first citation, at least in this dispute, of the case of Blankard vs. Galdy, in which connection the writer of the address hastens to point out that Maryland's claim to English laws is better than that of Jamaica, for Maryland is not a conquered country. Then the address brings forward an argument with which we shall become familiar. If English statutes do not extend to the colonies except by express wording to that effect, how can Magna Charta or other statutes which protect the rights of the subject, passed before the grant of the Maryland charter, extend thither? This is used as a *reductio ad absurdum*. Finally, in answer to the Proprietor's advice to enact *de novo* the statutes that they want, they urge the great practical difficulty and expense in such a plan. The address closes with professions of loyalty to the Proprietor and to the Crown.

The report of the Committee of Grievances, in 1724, may be passed over, for it was chiefly historical, reviewing past commissions and claiming that present ones were faulty in dic-

[3] Above, p. 33.
[3] Above, p. 34.
[4] Ibid.

tion.[5] Thus we come to the session of 1725, and to the manifesto sent by the Proprietor through the medium of the Governor. Now, the Proprietor made no such curt and dogmatic denial of his opponents' position, as he had done in 1723. Instead, his statement was long, carefully prepared, and argumentative in tone. He disclaimed any intention to deny that the Marylanders were "His Majesty's subjects" or to assert that their Province was a conquered country. Pointing out the antiquity of the question at issue, and the failure of the Assembly to settle it in the past, he returned to the basis of authority and the adverse opinions of the best lawyers in England.

Moreover, he cited certain Acts which logically came under the claims of the colonists, but which were known *not* to extend to the colonies. The first adduced is the Habeas Corpus Act. This has "often been adjudged by all the judges not to extend either to Ireland or the plantations, which is as strong a case as can be mentioned, as it is in favor of liberty and the terms of the Act as general as can be."

Along with the Habeas Corpus Act the Proprietor mentions the Statute of 5th Elizabeth "about servants,"—which, if extended to the plantations, "would be destructive to the very being and constitution of them"—the Statute of Usury, and that to prevent frauds and perjuries,[6] and many others which have been expressly and often held not to extend to the plantations, when doubted, either by the courts of law, or before the King and Council, and yet these are general laws of equal obligation with any other law or statute whatever.

From the presentation of Acts which refuted the assertion of the country party, the Proprietor turned to their argument from Blankard v. Galdy. He

"little thought to find a position introduced with that solemnity to be only the saying of a single counsel, on one side of the question, in opposition to the averment of the counsel on the other

[5] Above, pp. 34-5.

[6] The argument from these acts seems to be taken from Blankard v. Galdy, as reported in 4 Modern, 222-3.

side and contrary to the resolution of the Judges in that very case, viz. that Jamaica was not bound by our laws unless particularly mentioned therein, but by their own particular laws and customs." The charter of Maryland made full provision for legislation, and the inhabitants "will find it, I believe, your Happiness, if the Statutes of England, not expressly located thither, are not in the gross in force among you."

These two lines of argument were in answer to those submitted by Dulany and his followers. Now, a third is initiated by the Proprietor, with an evident idea of special impressiveness.

"I cannot but observe to you, at this time, what his most gracious Majesty has been pleas'd to do, in relation to the English Statutes taking place in the Plantations, in a particular case of Jamaica, where an act was lately made, instituted an Act for making his Majesty's Revenue Perpetual, and augmenting the same, and continuing and declaring what Laws are in Force in this Island." This act was disallowed by the King and Council on the advice of the Commissioner of the Treasury and the Commissioner of Trade and Plantations and the Attorney and Solicitor-General "for that the said Act might possibly introduce the whole body of the English laws to become laws of Jamaica, in cases not particularly provided for by laws of their own, which in many cases were by no means competent, but might be a great mischief, and be attended with many inconveniences, both to his Majesty's government in that island and to the estates and commerce of his Majesty's subjects there."[7]

The Maryland resolutions are therefore in error. At the time of this decision it was recommended to His Majesty to allow the Jamaicans to enact *de novo* the particular statutes suitable to them. The same privilege, the Proprietor declared, he offered to the inhabitants of Maryland.[8]

Thus far, the Proprietor might be said to have the best of it. He had adduced high legal authority in favor of his position; he had cited examples to disprove the colonial argument; and he had quoted a recent case which represented a legal parallel to the situation in Maryland.

He was dealing, however, with one whose reputation for legal ability was not unfounded. In reply to Baltimore's letter, the Committee of Laws prepared for the Lower House

[7] This one of the many attempts by the Jamaicans failed; but in 1728 they were successful to some degree. See above, chapter ii.
[8] Above, p. 36.

another address, brought in October 8th, 1725. After polite introductory remarks, this address repeated what was apparently the battle-cry of the country party, that Maryland was settled by occupation and not by conquest—and then started in for rebuttal.

First, the Proprietor was told that the Assembly was aware of the adverse opinions of lawyers with respect to the other plantations, but knew of no controversy in this except this with His Lordship.

Secondly, the Habeas Corpus, the Statute of Laborers, and the Statute of Frauds and Perjuries are taken up, and the arguments of the Proprietor are met in a manner skillful if not convincing. This point is of the more interest, as the Habeas Corpus Act was that, of all others, over which the colonies generally expressed interest. The result was the strong assertion that the Act did not extend to the plantations: and in Virginia we find this theory put into practice, when the Act is definitely extended to a particular colony by the somewhat doubtful method of a royal instruction. It is with some interest, therefore, that we turn to Dulany's handling of this matter.

The Habeas Corpus Act, the Proprietor had said, was a general Act, and yet did not extend to the plantations. On the contrary, says Dulany, it has *as express words of local limitation* as any statute — especially in the eleventh and twelfth paragraphs. The damaging authority of this law thus weakened, Dulany proceeds to avoid the admission that Maryland does not enjoy its privileges. *They* do claim this statute, for it gives privileges to Englishmen, and the *charter* expressly grants them all the liberties, franchises, and privileges of Englishmen, with a general *non obstante*. This statute was put in practice here while the Crown governed, and is, by a common-law construction, easily reconcilable here. This is argued at length; then it is once more urged that the fact that the Act does not extend to other plantations must not argue against its extension to Maryland, unless the other

plantations are shown to have the same charter and like privileges.

In the case of the Statute of Laborers, they have an Act of their own, likewise in the case of the Statutes of Usury, which they "hear are disused in many parts of England." The Statute of Frauds and Perjuries is used here. These and all other statutes are under the rules of common law that are used by the judges in construing statutes in England, except such statutes as are in favor of privilege, which, whether located or general, are expressly granted by the charter.*

From the discussion of the Habeas Corpus Act and the other statutes, the address proceeds to a further consideration of the case of Blankard vs. Galdy. The Proprietor had accused the Assembly of quoting only counsel on one side. Dulany admits this, but retorts that this was not denied by the other, and that the Proprietor is mistaken in his quotation. In his error there are two parts. First, the adverse judgment was not upon the Statute of Limitations but another; and, secondly—and of greater importance—reference to Salkeld's report of the case shows that the first resolution of Lord Holt and the whole court declared the extension of all laws in force in England to an uninhabited country, newly found by English subjects. This, moreover, was by common right, and not by charter. Now, a country inhabited only by savages is like an uninhabited country, with respect to the law of the new-

* The extension of the Habeas Corpus Act to the Colonies has been made the subject of a paper by Dr. A. H. Carpenter, in the American Historical Review for October, 1902, pp. 18-27. This contains no reference to the controversy in Maryland, except the citation of Yorke's opinion of 1729, which is left without comment. With reference to the other Colonies, the article furnishes a valuable narrative. The *Act* did not extend to the Plantations (except to Virginia, after 1710, through the royal proclamation of doubtful authority, and to S. Carolina, where the statute was re-enacted), but the Colonists claimed and used the Common Law right of Habeas Corpus, which they strengthened by provisions in their court laws, and by very strict bail laws, with heavy penalties for their non-fulfillment. The practice in Maryland was apparently similar, but Dulany's claims went beyond this.

comers; Maryland, therefore, lies within the scope of the resolution of the Chief Justice.

The Proprietor reminded them that they had a legislature of their own. This, Dulany replied, was for convenience, and did not remove their right to English laws, which they considered "a happiness." He proceeds:

"And we beg your Lordship to consider that your putting us in mind of the happy condition the Crown, by your charter, hath thought fit to place us under, which we ought quietly to submit to, is not an agreeable way of treating those you are obliged to for the success of your Province. It was no bounty in the Crown to place us here, unless we had not deserved longer to live in England, and that English Liberties were given us here, when we had forfeited our Right to them there. This would indeed have been a Bounty and very well have admitted a Propriety in the Expression you use, 'That the Crown thought fit to place us under.' But we take leave to observe, That the Crown had no Right to give us other Conditions than in common with our Fellow-Subjects, nor to place us here or elsewhere, but by our own Consents. And we hope that you will not take it ill, that we again remind your Lordship, we are His Majesty's Subjects, and have equal Right with others to breathe British Air, and that your Lordship's Prerogatives, and your Tenants' Priviledges are both dependant on the same Royal Grant, and that your Lordship and we are both subjects to One Just and Gracious Prince, who will not countenance the abuse of his People in the remotest corner of his Dominions. And therefore we beg your Lordship will give your Secretary better Impressions of us than to treat us so much like men that owe their Lives and Liberties only to your Charter." . . . . .

Thirdly, considerable space is then taken up in emphasizing the differences between the recent Jamaica case and the situation in Maryland. The former was introducing statutes she had not had before; must Maryland re-enact *de novo* statutes that she *had* used?[10]

Having thus answered Baltimore's letter point by point, Dulany adds further arguments from precedent, gleaned from the early records of the Province, some of which show the difficulties through which the early colonists had passed. When an English Act was doubtful, they had passed Acts to make it applicable to their needs, and the very modification was an argument that without such modification the English law was in effect. The change of this nature in the Act of

[10] Compare the facts as given in ch. ii.

Limitations, 21 Jas. I. ch. 16, is noted; then the old conclusion is urged, to grant the rights of the common law and withhold that of the statutes would be piecemeal and precarious—making their statute rights depend on the Lord Proprietor [with his power of veto].

The concluding argument is a new one, taken from a *non obstante* clause in the royal charter. In the paragraph giving the Proprietor the right to alien lands, and the purchasers to hold them, in any estate [tenure] that seemed expedient. "There is an express provision that it shall be lawful so to do, notwithstanding the Statutes of 18 Edward I, commonly called *Quia Emptores Terrarum*, or any other statute, which we hope sufficiently shows the intent of the prince that made the grant and the sense of that time, that the general statutes of England did or at least would (by that grant) extend here, and that therefore such *non obstante* was necessary, which otherwise would have been useless."

With a request for prompt action in this matter, a complaint against the encroachments of their neighbors upon the Delaware, and a warning against "busy whisperers" who are trying to create "doubts and misunderstandings betwixt Your Lordship and your tenants"—by which the clergy probably are indicated—the address of 1725 comes to an end.[21]

With this address of 1725 we may conclude our detailed consideration of the Assembly documents, for though several of a similar type were drawn up, notably the report of the Committee of Laws in 1728, and the address of 1730, these dealt more with the wording of the oath and less with the general principles. As we have seen in chapter III, this question of phraseology was at length compromised, and we also noticed a similar yielding in the opinion of Yorke in 1729.[22]

In the preceding year, from the press of W. Parks, in Annapolis, there appeared a small folio pamphlet of some thirty-one pages, written by Daniel Dulany, and bearing the

[21] Above, p. 36.
[22] See above, pp. 21, 38-9.

title "The Right of the Inhabitants of Maryland to the Benefit of the English Laws." If to books, as to people, uniqueness and old age lend a certain charm, this little volume—one of the earliest printed books of Maryland—is, on this score, remarkable. An advertisement of it in the Maryland Gazette during 1729 indicates that it must have had some circulation through the Province. However this may be, only one copy, to the present writer's knowledge, now survives.[12] But, besides this rarity, the subject-matter of the volume and the method of treatment make it very desirable to print the whole text as a supplement to this paper. In view of this, only a brief outline of its argument need be given here.

The author begins with a reference to the "pretty warm contest" that has been going on over the English laws, statute and common, and undertakes to prove the right of the inhabitants of Maryland to these English laws; first, on the ground of a common English citizenship, and secondly, on the basis of the rights granted in the charter. After a classification of the English law into the common and the statute laws, and a description of the sources or component parts of each, he asserts that this law of England is the subject's birthright and best inheritance. In support of this is adduced the authority of Lord Coke, the speech of William Creswell before the House of Commons in 1627, and the resolutions of March, 1628.

If, then, all English citizens enjoy the English laws, the Marylanders are English citizens and hence must share their privileges. In rather eloquent words Dulany describes the difficulties which the first settlers met and overcame. Now,

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[12] This one imprint is among the Calvert Papers in the possession of the Maryland Historical Society, which has kindly consented to the reproduction of it in connection with this paper.

Personal search, or information furnished from the librarians, indicates that no copies are to be found in the Bodleian, the British Museum, the Library of Congress, the Harvard University, the Boston Public, the New York Public, the John Carter Brown, the Pennsylvania Historical Society, the American Philosophical Society and the Virginia Historical Society libraries; nor is the book mentioned in Sabin's Dictionary of Works Relating to America, nor in Haven's List of Ante-Revolutionary Publications.

not having been banished from their mother country, not having abjured it, having on the contrary benefited it commercially, and never having swerved from their allegiance, they are still English citizens. This, the crucial thesis of Dulany's argument, is supported by significant citations from Puffendorf's Law of Nature and of Nations, Grotius On the Rights of War and Peace, Coke, and the Acts of the Apostles. In the latter case, the fact of St. Paul's appeal to Cæsar on the basis of his Roman citizenship, leads to the deduction that the Province of Maryland is as much a part of the British dominions as Tarsus was part of the Roman Empire. If anything, the claim of the Marylander is stronger, for his ancestors were English, while those of St. Paul were not Roman.

Then follows a citation from John Locke's Second Essay on Civil Government. The passage selected treats of equality, and is used to argue therefrom the equal right of all the subjects of the English King to the protection and laws which their allegiance justifies.

Next comes an attempt to show that the *statutes* are an essential part of this inheritance. For statutes are the only means of remedy against invasions of the Common Law Rights of citizens. Now, right and remedy are inseparable. As was said in the case of the Aylesbury Men, want of Right and want of Remedy are *termini convertibiles.*

The great bulwarks of English liberty have been erected as statutes. Witness Magna Charta; the various establishments of civil liberty under the Edwards; the Petition of Right, with its reference to ancient statutes; the Acts of the Long Parliament, especially that for the dissolution of the Star Chamber, the Habeas Corpus Act, the Act for settling the succession of the Crown—all were statutes, and surely all English citizens have as much a right to these as to the benefits of the common law. In Maryland, also, are they needed to an equal degree and equally prized.

The argument contra, from the adverse decisions of the courts with reference to Ireland, or the English territories in

France, is met by emphasizing the fact that these countries were already civilized and had laws of their own. The consideration of the Earl of Derby's Case, and Calvin's Case, leads up to a long citation from Grotius on the wisdom of yielding even to a conquered country its own laws. But Maryland, argues Dulany, is not conquered, or, if so, only as against the Indians. The English settlers have lost no rights.

This finishes the first task, the establishment of those rights on the ground of English citizenship. To this is now added, by way of reinforcement, a second line of argument based upon the rights conferred by the royal charter. By the terms of this grant, all rights of Englishmen are distinctly and incontestably bestowed on the freemen of Maryland. In this way the former method of reasoning applies. The statutes of England were necessary to the safe enjoyment of these rights and continue to be their defense.

After condemning the adverse opinion of "an eminent lawyer," Dulany clearly states that the charter does not really give these rights, as new ones, but merely recognizes them as existent, as was the case in Magna Charta in England. The argument that, because Maryland has her own Legislature, she cannot have English laws he considers futile; for the different circumstances of the colony necessitate changes which can only be decided by a local body. It does not follow that the Legislature of Maryland can enact for that Province all the English statutes.

The concluding paragraphs are in some ways the most interesting of all; for here, deserting the argument from the English law, he proposes a Lockeian theory of society, and applies this to the settlers of Maryland. If these agreed to make the law of their mother country their own law, and on long experience are convinced of the equality and justice of them, "Will anyone say that they are obliged to change those laws, or to have them upon any other terms than they have always had them, without their own consent, or the interposition of the supreme authority of their mother country." The familiar and long-continued reception of the English

statutes, without any other authority, is sufficient to give them permanent force.

Thus closes the pamphlet. At once we see that it is clearly related to the documents found in the Assembly records, and that many of the arguments found in one are common to the other. But we also notice a distinctive feature, in the emphasis laid on the broader principles of Natural Law, taken from Locke, Grotius, and Puffendorf. Of the significance of the appearance of these ideas at so early a time in the eighteenth century, we shall speak more fully in what follows. All things considered, this pamphlet may rank as of high importance, not only for its relation to the course of politics in Maryland, but because it is the only pamphlet, so far as the present writer knows, which is entirely devoted to the discussion of the extension to the colonies of the laws of England.

It is to be regretted that so little documentary evidence is extant to show what was the attitude of the people generally towards this controversy. The records of the Assembly and the Calvert Papers show us that the Lower House, for this purpose, followed Dulany's leadership; and his frequent re-elections indicate that his popularity or his influence was great. But it is not until the end of this struggle that the Maryland Gazette appears, with its interesting sidelights on politics, and then its career is but brief. Private letters of one sort or another have survived, but these usually deal with economic matters, and especially land or tobacco, or with personal affairs, and throw little light on general politics.

One interesting and valuable expression of opinion in the English statutes controversy, which chance has preserved, may, therefore, be given somewhat more consideration than, if materials were plentiful, it would deserve. A bound volume of manuscripts, in the possession of the Episcopal Library of Maryland, consists of the works of the Reverend John Eversfield. This was an Oxford graduate who came to the colony in 1727 and received induction into a parish in Prince George's county, Maryland, where he served as rector for

half a century.[14] The volume referred to includes, first, a Compendium of Logick; then, in succession, "A Short Treatise of Morality," a fragment "of Political Liberty," several legal notes, such as definitions of "usage" and "constitution," a rather long discussion over the extension of the English statutes, a translation of the charter, notes on the *non obstante* clause and on the judges' oaths, and, finally, an incomplete "appendix," dealing with the obligation of law.

No printed work of Eversfield's is known to the present writer,[15] nor can it be estimated how wide a political influence he exerted. The emendations in his manuscripts suggest, however, that his writings were meant for public use in one fashion or another. What is of especial significance to our present inquiry is that he had a most determined antipathy to Dulany and his theory of the extension of the English statutes. This appears from the epithets that he applies to the Atorney-General, though to his credit it should be said that these strenuous expressions are generally canceled and milder ones substituted. We find, for example, "a great lawyer

[14] From The Bowies and their Kindred, by W. W. Bowie, we learn that Mr. Eversfield was born Feb. 4, 1701. He began his education at St. Clive's Grammar School, Southwark, and matriculated at Oxford Apr. 6, 1723. He was ordained deacon in 1725, and priest two years later, shortly after his attainment to the baccalaureate. He was also A. M. of St. Mary's Hall (now reincorporated with Oriel). He came to the province in good circumstances, and acquired large tracts of land. Though he was fond of life and a great fox hunter, his excellent reputation gives the lie to the hasty generalization which would condemn all the colonial clergy to the opprobrium justly laid upon some. He lived till after the beginning of the Revolution, in which time he, like many of his class, was a Tory. An examination of his private papers, for which the writer is indebted to the kind permission of Dr. W. O. Eversfield, shows that he brought with him or purchased from Europe many of the leading works in politics. Among these appear the following titles: Puffendorf's Law of Nature and of Nations, Calvin's Institutes, Hooker's Ecclesiastical Polity, Grotius on the Growth of the Christian Religion, Nelson's Abridgement of the Common Law, another edition of Puffendorf, Blackstone's Commentaries, Bolingbroke's Political Tracts, "The European Settlements in America," "Every Man his Own Lawyer," Vattel's Law of Nations.

[15] Unless his "Compendium of Logick" was actually printed, which some circumstances seem to indicate.

among us," " Irish kidnapping dogs . . who cajole their poor silly countrymen into American servitude under pretense of advancing their ragged fortunes . . .," " pettifogging attorneys," etc. Moreover, in the course of his denunciation of Dulany's programme, he occasionally makes interesting remarks as to the economic condition of the Province. Again, it is significant that his ideas show very distinctly the influence of the writings of John Locke, whom, for one purpose or another, he frequently quotes directly. Eversfield's great fault as a writer is his bad style, which is characterized by great diffuseness, entanglement of ideas, and tiresome repetition.

A few of his arguments may be summarized. In paragraphs injected into his discourse on Morality, he declares, in opposition to Dulany, that " no law binds any people but those for whom 'tis enacted, nor 'em till made known by due promulgation." Without promulgation, no knowledge; without this, no rational consent; without either, no obligation exists, because obedience is impossible. English statutes . . " can have no relation to the people of Maryland, except they were singular from the rest of the world in having laws before they were a people. To have such laws would be the worst of slavery, yet in this condition has "this lawyer of ours and his followers endeavored to involve the Marylanders, and that, too, under color of English liberty." Neither the civil, nor, in Eversfield's view, the Canon laws of England extend to the colonies, unless the latter are especially mentioned.[16]

Later, he states more specifically that the expression " laws and statutes of England, agreeable to the usage and constitution of Maryland " means such laws as have been used " time out of mind " in the courts of Maryland and approved by the laws and government in the most express manner. Otherwise the judges are given an arbitrary power to decide at random, according to their own discretion. This, he thinks, administers greatly to corruption.[17] And in another place,

[16] Eversfield Volume, pp. 110 ff.
[17] Ibid., p. 269.

where the same topic receives expanded treatment, he says: "Arbitrary justice suits only the condition of slaves," and declares that if the rule of law is uncertain, life, liberty, and property are jeopardized.[18]

Then comes a classification of English laws (statute) into general, which specifically include "the realm of England and all other dominions thereto belonging", and particular statutes—the latter in turn being subdivided into definite particular, which mention the place in which they are to be effective, and indefinite particular statutes, which mention no location, yet are implicitly located [restricted] to "the place and people only for whom they were made, since laws bind none but those particular subjects for whom they were designedly made and for the redress of whose grievances they were intended." From this point he proceeds:

"Many such laws are in England, which being made for the benefit of the English nation only are of obligation to no other subjects but those of that nation; for that nation only having representatives at these parliaments wherein such Laws were enacted none but the people of that nation can be bound by them sith none but they consented to the making of them or indeed know of their being made [:] for the Laws of England enacted for its Benefit only are not promulgated because every Englishman in Construction of Law is supposed to be present by his proxy or Representative at the making of such Laws and his Consent and Knowledge are presumed in every Act of Parliament Passt by them. But with English Subjects Living in another Land who have no Representatives there the Case is quite otherwise for they must be particularly expressed in every English Act of Parliament that Binds them and the Act must be duly promulgated amongst them in the most publick places by their Sheriffs otherwise or by the Governor's order in the Gazettes."[19]

The good parson was then struggling between his belief in the Lockeian government by consent and his regard for the sovereignty of Parliament. For he proceeds to show that the colonists have *not* the full privileges of Englishmen *because* they are subject to the authority of Parliament. In spite of the "soothings" of "illiterate lawyers," the English colo-

[18] Ibid. pp. 278 ff.
[19] Ibid., pp. 270 ff. Compare Shower's argument for the plaintiff in Blankard vs. Galdy; Salkeld, p. 411; or 4 Mod., pp. 222 ff.

nists are *worse off* than those of France; for "both are equally governed by arbitrary legislatures, and the sole difference is in the number of hands in which the arbitrary legislature is lodged." In France, it is the King alone; in England, both King and Parliament. There is no difference in the subjection; "in both the subject having no vote or liberty of demurring under either: obey they must, both willing or not willing, or in default, be punished for their disobedience by an armed force, which is as demonstrative a proof of arbitrary power and vassalage as can be given."[20] Nor is this servitude, he continues, very much abated by their having Assemblies to make laws of their own, for these laws must be consonant to those of the mother country. Moreover, they are grievously oppressed by the Acts of Parliament which bind their trade.[21]

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[20] Eversfield Volume, pp. 272-5 ff.

[21] Ibid. pp. 273-4.

In view of the opinion lately pronounced that, in the eighteenth century the Commercial Legislation of England was not regarded as a grievance, it may be worth while to give verbatim a paragraph or two in which Eversfield discusses these matters. Compare Economics and Politics, pp. 10-12.

"Considering that . . . their trade is cramped with high duties and that their staple commodities must be landed in England before they can be exported to foreign markets, which is putting them to the charge of a double voyage, and that no foreign goods is to be imported among them, but from England, which gives the English merchants room to exact unreasonable prices for them notwithstanding the drawbacks—that their clothing and necessaries are to be had from England only, and all the ways and stratagems used to discourage the manufacturing of them among themselves,—the privilege of constitutional legislation [in the Assemblies] will be found but a very small abatement of the many vigorous hardships incident [:] and [it] will be found . . . that French Vassals in America enjoy more valuable privileges, at present, how much surer they may be adjudged hereafter, than English ones in the Plantations [:] for [besides the probability that the French will have such legislatures] . . . they have the greatest encouragements from France for peopling their colonies and carrying on their respective manufactures as any people can desire[.] They have lands almost for nothing, paying a mere trifle by way of acknowledgment for quitrent, pay very inconsiderable duties for their commodities exported, have liberty to export them to any European market they please without being obliged to land them first in France as the English colonies do in England, whereby they save the charge of a second voyage and have the benefit of an

Then follows comment upon the words of the judges' oaths, with criticism of their indefiniteness, which gives to the judges an arbitrary power to select the statutes which are suitable. If the rule of law be uncertain, life, liberty, and property are jeopardized. "Usage," in the judges' oath, must mean the general or particular customs of England received in the Province of Maryland.[22]

The last illustration of Eversfield's ideas that we shall now present consists of a discussion of the common law of England and its application to Maryland.

"The common law of England binds the people of Maryland so far forth as it is rec[eived] by the express or tacit approbation of the Legislature and not otherwise, for the common law, notwithstanding

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early market whereby they can afford to undersell the English merchants in the like commodities with sufficient gain to themselves [:] moreover they import foreign commodities in lieu [?] of them to their respective colonies at a very cheap rate and pay little or no duties either for their imports or exports, which are advantages and privileges the English colonies want for they pay dear for their lands, high duties for their exports, large prices for their imports, are under obligation to land their staple commodities in some port of Great Britain before they can be exported to foreign markets where by the expense of a double voyage and late markets they're undersold by the French and their commodities vended scarce pay for the clothing and feeding of the slaves that make them. And so small a share of the produce comes to the masters of such slaves that were it not that they rais'd their own provisions and made some coarse cloth for their families in some places they could scarce subsist [:] and the merchants at home having the disposal of their commodities frequently defraud them of part of their small gains and send them goods in exchange at a very dear rate to the no small impoverishment of the poor planters and their families, whereby their condition is far worse than that of the French vassalls in the Plantations, and tho' they may have the name of liberty yet the French have it in reality [:] notwithstanding the great boast of it among them by such who either understand not the nature of it or if they do for their own private gains study to deceive the populace with the phantom of it under a most specious name and artfull sophistry capable of being invented by the most horrid Machavalian policy [sic]."

For this very pessimistic outburst no specific date is given; but the connection with the Statutes controversy, the suggestion of economic depression, and the thinly veiled reference to Dulany's agitation indicate that it is probably to be placed not much after 1732.

If this hypothesis is correct, the boldness of expression, as well as the facts stated are rather significant.

[22] Eversfield Volume, pp. 276-280.

its being built on reason and deduced from some of its common principles, yet it binds not as a law till it be re[ceived] by the consent of the legislature[.] There are many propositions from rational principles which carry fitness and conveniency with them, yet have not the obligation of laws." [. . Equal division of real as well as of personal property among a man's heirs is one of these, but . .] "the common law of England is otherwise, for it gives the freehold to the first born only. 'Tis also reasonable that all who are bound by the laws of the commonwealth should have public means afforded them of being instructed in the knowledge of them, yet there are no public law schools erected for such purposes, notwithstanding the reasonableness and—[?] of them[;] and many more reasonable propositions can be adduced which are very just and usefull, yet for want of the Legislature's authority to enjoy them they have not the force of a law[;] and were the common law of England to be rec[eived] in Maryland becaus 'tis reasonable, so ought it to be rec[eive]d in Scotland likewise, seeing what is in itself reasonable in one place is so in another. But the case is quite otherwise, for the Scotch have a common law of their own extracted from the Civil Law and common customs, and founded on reason also, and are in no wise subject to the Common Law of England. The reason, then, why the inhabitants of Maryland are bound by the Common Law so far as it suits their constitution is their own consent, for 'tis not obligatory upon them by their charter, nor by any reasonableness of it which is [a] matter of moral prudence and not of civil obligation. . . . ."[23] He then proceeds to chide the lawyers for locking up the law from the people.[24]

It is a pity that we cannot know exactly when these reflections of the country parson were set down, whether they were made public — perhaps in his Sunday sermons — and how much influence they exerted. Among his books, we know was later one entitled "Every Man His Own Lawyer"; and of his dislike for the specialists of that profession he leaves us little doubt. We are not surprised, then, to find that his thoughts are not collected so as to utilize their full force, as is the case in Dulany's addresses; or that he is not so ready with precedents and cases as the professional lawyer. More striking than these differences, however, is the similar influence of the natural rights ideas, which is as distinctly visible in Eversfield's writings as in Dulany's. In fact, in the passage last quoted on the Common Law, he states boldly the doctrine of consent which Dulany had brought in more as an hypothesis than as a fundamental argument.

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[23] Eversfield Volume, p. 321.
[24] Ibid. p. 322.

CHAPTER V.

Results of the Controversy—Direct and Indirect.

In considering the results of this controversy, and in attempting to set, in their due relation to the history of the British Empire and to that of the American colonies, the succession of events and the interchange of arguments that we have described in the preceding chapters, we must avoid magnifying to an undue importance that which has come beneath our observation. Maryland was but a small corner of the political world, and to the Empire—perhaps even to neighboring colonies — this controversy and its leaders remained unknown. In this cautious frame of mind, however, we may endeavor to look at the affair in the larger relations of time and place, and with this survey bring our essay to a close.

First, then, we have seen that the technical points at issue were compromised, to the Proprietor's advantage perhaps, and that the leader of the popular body passed over to the official circle, there, however, still exercising his influence for the public good. The compromise, moreover, was only a makeshift, and left an indefiniteness in this part of Maryland law, which differentiated the latter somewhat from the jurisprudence of the other colonies, and from the general theory of the United States Supreme Court.

Next, the reader may once more be reminded of the close connection of this with the other expressions of unrest that mark this period of the colonial history of Maryland, while the whole will impress on him the error of the older view that regarded this as a time of halcyon quiet in colonial administration. In the former essay, also, it was shown that other causes of strife ensued, and that henceforth the Assembly was rarely without some active aggression upon one or another of the prerogatives of the Proprietor.

Again, we find this controversy in Maryland but one outcropping of a general uncertainty which existed in widely distant parts of the Empire, with reference to the legal connection between the mother state and the colony. Nor was even the judicial theory of the Imperial Courts consistent and uniform. In this condition of doubt, then, one colony very naturally looked for argument and precedent to the experience of others, though no concerted action on this point ever took place.

The main propositions urged by Dulany and his party did not survive, for history was against them. Dulany was in the wrong, not merely from the standpoint of the Proprietor, the Crown lawyers and the decisions of the English courts; he was arguing what would really have been to the detriment of the Province. For what would it have meant, if all general English statutes—*i. e.*, those not specifically limited to England — had extended to the Province? Blackstone suggests the answer.[1] If this doctrine had been maintained, many of those cases wherein the colony was free from the complications and burdens of the older civilization would have been reversed; while, if it were answered that the colony could pass laws of its own to amend such statutes, the reply would be that such laws might be vetoed by the Proprietor quite as effectively as laws to extend English statutes. In fact, the power of dissent, if its exercise were continued, would work either way; and it was just this control by the Proprietor over colonial legislation which lay at the root of the difficulty. Dulany is playing the rights of Englishmen against the prerogative of the Proprietor.

It will undoubtedly have been noticed that in the arguments of the country party no word was said of the danger of parliamentary control; it is Eversfield who complains of the Navigation Acts and Acts of Trade.[2] Yet, we know that the burdens of this legislation were not unrealized; and we can

[1] Above, p. 22.
[2] Above, pp. 58-59.

hardly suppose that either Dulany or his supporters really wished in any way to increase the authority of Parliament. What they did want was this: to have the statutes of England, especially those of a beneficial or remedial nature, as a sort of reservoir, from which they could draw easily and quickly, without the possibility of prevention on the part of the proprietary.

Recognizing, then, that the direct object which Dulany aimed at proved a failure, one naturally queries if this was all. Had the controversy no further result than to give Dulany a place in the official system of the colony? or did it exert any influence on later years?

In answer, let us consider first a purely formal survival, in the case of the very first manifesto of the country party. Part of the Resolutions of 1722,[3] with which Dulany had opened fire, denied with rather skillful rhetoric the applicability to Maryland of the conquered province theory. Moreover, they contained in themselves a provision for their perpetuation. Now, to every historical investigator there is an obvious difference between a requirement that the reading of certain resolutions shall be a standing part of the legislative procedure, and the actual fulfilment of that requirement; and proof will be demanded that the use of these resolutions was continued. In this case, the proof is forthcoming.

A perusal of the manuscript journals of the Lower House shows that these resolutions are very often, though not always, included. The transcription upon the records might have been, however, a very formal matter; it is much more interesting to feel that they appear from time to time in the *printed* votes and proceedings of various sessions, for in this form they had a far wider circulation among the people, or, at least, among the politicians.[4] We may go farther, however, and connect them directly with the revolutionary times, for one of these printed "Votes," of the year 1745, in which

[3] See Appendix, where the Resolutions are given in full.
[4] Several of these are in the possession of the Maryland Historical Society. Among them is that for 1745, referred to in the text.

the resolutions appear in full, bears upon it the name *Carroll*, and the comment: "These resolutions were entered annually in the Proceedings of the House of Burgesses, as far as I can understand. I have several other sessions in which they are entered."

If, on the one hand, this suggests that the origin of the resolutions had been lost sight of, on the other it shows that they were regarded as worth consulting at a later time. This is borne out by comparing the more important resolutions of the revolutionary period, such as those on the Stamp Act, where there is some similarity of language, although the greater number of resolves deal with new matters. Such cases of partial reference are, of course, harder to make certain, for by that time the parlance of the radical party was much the same in every colony. The more noteworthy, therefore, is the appearance of these resolutions of Dulany's, in their integrity, as late as 1771.

When, in 1770-1772, the great dispute over the fee bill and Governor Eden's proclamation reached its height, on one occasion adopted certain resolutions. Dr. Steiner, in his monograph on Eden, speaks of these resolutions "which told in ringing words of their fixed determination to resist all unjust claims of England," as if they were prepared for the occasion; and this impression is deepened by a note which quotes at length a resolution treating of the relation of the colonists to the Indians—a resolution strangely irrelevant to anything then under discussion.[5] In reality, these resolutions of 1771 consist, first, of the resolutions of 1722, plus slight modifications made subsequently, and, secondly, of a protest against the assessment of the export tax on tobacco, which, since 1750, had been permanently attached to the standing resolutions of 1722. Now, the whole is again brought forward as a basis for all additional resolutions of rights. It is not unworthy of remark that now the younger Dulany, who, a few years

[5] Steiner, B. C.: The Life and Administration of Sir Robert Eden; Johns Hopkins University Studies in Historical and Political Science, Series XVI., pp. 47-8 [381-2].

before, was in his turn defending colonial interests, appears in the fee bill controversy as the champion of prerogative and of the proclamation.

We have, then, one case in which part of the controversial material of 1722 survived to the revolutionary period in its original form. This, however, is unique, and from it we must pass to the general character of the documents which we reviewed in the last chapter, their principles and their phraseology.

In so doing, one is struck at once by the fact that the reasoning of all the important documents—the reports and addresses, Dulany's pamphlet, and, to a less degree, Mr. Eversfield's notes—is distinctly that of English law. This is seen, again, in the sources from which the writers of these papers drew. Dulany, we know, like a number of others, had supplemented his education in Maryland law by a brief period of study in Gray's Inn. That he is thoroughly at home in the English cases, he shows by quoting Coke's Institutes and Reports, the reports of Vaughan, Holt, Salkeld, Anderson, and Roll, Wingate's Maxims, and, for constitutional history, Hale's History of the Law and Rushworth's Collections. At least twice we are referred to Care's "English Liberties," one of the many summaries of the practical parts of the English law that preceded Blackstone's Commentaries. Considering, then, his handling of authorities, and his method of using them, as attested not only in these papers, but in the Maryland reports of Harris and McHenry, we may hold, without yielding to the *Lues Boswelliana,* that Dulany was among the ablest lawyers of his generation in all the Atlantic colonies.*

Now, within the Dulany family this legal prestige was handed down; for Daniel Dulany, the younger, carefully educated in England and trained in the law, surpassed the fame of his

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*Andrew Hamilton, of Pennsylvania, of course, enjoyed a wider intercolonial reputation, and some others, such as Attwood or Mompesson, were more prominent in Imperial politics.

father.[7] But apart from this personal influence, and its fruit in the next generation, the distinctly legal character of the controversy over the English statutes undoubtedly helped to stamp a similar feature upon the subsequent constitutional development of the colony. This emphasis on the legal method of procedure was older than Dulany's work; it was in some sense a characteristic of Maryland's development from the beginning, but it was reinforced by the succession of legal documents which Dulany wrote for the Assembly. Henceforth, to the Revolution, the lawyers led the Assembly to attack one part of the government after another, and the bar of Maryland increased the roll of distinguished names till the Carrolls, Paca and Chase won, on the patriotic side, fame which his Tory opinions lost to the younger Dulany.

English law, however, was not the only source of the general principles which these papers expound. Of really more novel significance is the emphasis on the Law of Nature. The progress of the colonial mind, before the Revolution, to clarity and agreement on the political relation of the mother country and the colonies is to be traced in a mass of literature which lies beyond the limits of our consideration here. After the Stamp Act the American colonists were not anxious to claim English statutes; on the contrary, they finally denied the right of Parliament to legislate at all for the colonies. Yet they clung closely, for awhile, to their English rights and liberties; and indulged in a good deal of curious logic to maintain their English privileges without their English responsibilities. If we consider, for example, the Declaration and Resolves adopted by the First Continental Congress, we find the second paragraph emphasizing these English liberties, the third declaring that they had not forfeited them by emigration, and the fifth and sixth claiming the right to the

[7] The Author of the Considerations on the Propriety of Taxing America, which Chatham used in England, was a legal oracle in the Southern Colonies until. when the struggle between the Proprietor and the Popular Party became intense, his defense of prerogative cost him popular favor and kept him on the Tory side in the Revolution.

Common Law, the English statutes which existed at the time of their emigration and which they found applicable to their local circumstances. The immunities and privileges of the charters are emphasized also.[8] Or if we consider the Fairfax Resolutions in Virginia, drawn in 1774 by George Mason, we find that they begin with the old statement that the colonists of Virginia were not a conquered people;[9] and similar citations, showing the basis of the English law might be made from writers from Massachusetts to Georgia.

These were not sufficient to justify the Revolution; and in their need the colonial writers gleaned the rich fields of John Locke's Second Essay on Government, and of the works of continental publicists, adapting from these sources the doctrine of the Law of Nature and basing their claims on the rights which that gave mankind. The only use of this system which we wish now to discuss is the employment of it to explain the legal system of America, in the following manner.

In a very interesting debate, which John Adams has reported for us, the committee appointed by the Continental Congress to state the rights of the colonists discussed the basis on which they should fix their rights.[10] The arguments are too long to quote; suffice it to remark that the radical wing declared that English law did not bind or had not bound the colonists *as* the law of England, but *by their own choosing*, and *only* by their consent. As was indicated above, this idea, so effectively destructive of the sovereignty of Great Britain was not pressed in the Declaration and Resolves; but the same principle was urged by Jefferson in his Summary View, and by John Adams in his Novanglus, to mention only two of the framers of political opinion in America. The

[8] Adams, C. F.: The works of John Adams, Vol. 2, Appendix C, where the original draft is given for comparison. The Declaration and Resolves may be found conveniently in Macdonald's Select Charters, etc., pp. 357-361.

[9] Rowland: The Life of George Mason, Vol. 1, Appendix VII. It is not impossible that these were influenced by the Maryland Resolutions of 1722, which had been readopted three years before (See Above p. 64). Mason may have known of these.

[10] Adams, C. F.: The Works of John Adams, Vol. II, pp. 370-373.

extension of English law, they claimed, was purely a voluntary act of the colonists.

Now, after this somewhat lengthy excursus, let us return to our documentary material in the Maryland controversy. Let us notice Dulany's citation of Locke to show that the Marylanders had an *equal right* to the English laws, with the inhabitants of England: let us follow his quotations of Grotius and Puffendorf, to support a similar idea; and let us observe in the closing paragraph a somewhat timid suggestion that the people of Maryland had a right from a state of nature to choose what law they would. What have we here but the very doctrine of 1774, expressed in a rude and undeveloped form? Not only in Dulany's pamphlet, but also in Eversfield's book, do we have the consent of the people urged as the only authority that gives binding force to law. Moreover, returning to Dulany's pamphlet, we meet the very phrases that did such service in later times: "a state of equality," "life, liberty, and property," "inherent rights."[11]

Let us be far from suggesting that Dulany's pamphlet introduced those ideas, or that from it did the later writers draw any ideas. What we wish to demonstrate is that the natural rights philosophy as applied to government, and its terminology or vocabulary, which are too often first mentioned in connection with James Otis or Samuel Adams, were common property a generation before Otis' first pamphlet saw the light.[12] During all this time these ideas were sinking in upon the colonists' minds, and if, when the Revolution came, their law failed them, they were ready with a philosophical justification of their position. To the verity of this statement, for Maryland, Dulany's pamphlet and Eversfield's notes bear ample witness.

One more point, before we close. As we all know, it was when the colonists, after a certain period of *laissez-faire* had

[11] The Right of the Inhabitants, etc., passim.

[12] Similar ideas, based on Puffendorf, appear in John Wise's A Vindication of the Government of New England Churches, published about 1717.

brought to their consciousness rather suddenly the realization of their imperial or, if one may stretch the term, their international relations, that the doctrine of Natural Rights became as it were their universal political creed. Now, few of the practical questions that came up could lead them more easily to this system of thought than this interrogation as to the legal relation of dependencies to the colonizing power, which we have had under investigation. For the English law itself, as seen in the decisions of the courts from Calvin's Case down, bore, here more than in most of its departments, the stamp of the influence of the Law of Nations; and how easy would be the passage from this to the Law of Nature, must appear to anyone who reads even the chapter titles of the Second Essay on Government. The same connection is witnessed to by the frequent reference to Grotius and Puffendorf, whose influence on revolutionary thought the greater importance of Locke sometimes causes us to forget.

Thus we bring to a conclusion our studies in this period of Maryland history. With the middle of the eighteenth century came changes in the *dramatis personæ* and in the questions, economic and political, which the provincials had to meet. But the new growth had its roots in the old. The improvement of the tobacco culture, the introduction of German immigrants; the possibilities open to a skillful leader in the provincial legislature; the warm discussion of the imperial consititution as applied to the Province—all of these found their beginning in that time which we have chosen for investigation, and which we have described in the foregoing pages.

APPENDIX I.

THE RESOLUTIONS OF 1722.

Proceedings and debates of the Upper and Lower Houses of Assembly, in the years 1722, 1723, and 1724, relating to the Government and Judicature of the Province. . . Philadelphia. Printed and sold by Andrew Bradford at the Sign of the Bible in the Second Street. MDCCXXV. [Pages 2-ff.]

OCTOBER 25, 1722.

Resolved, There be a Committee for the Courts of Justice.

Proposed by a Member and Resolved by the House, That the Members that are appointed as Members of the Comm. of Aggrievances, have likewise the Character of a Committee for *Courts* of *Justice*, and that that Character, and the Duty of such Committee, be annexed to the said Committee of Aggrievances as a Standing part of their Duty.

And that it be an Instruction to the said Comm., as a *Comm.* of *Courts* of *Justice*, That they observe the Nature of all the Commissions to the several Courts of Judicature within this Province, and that they especially observe any Alterations that may at any Time happen by accidental Omission or otherwise, therein, and particularly relating to such *Words* therein as require the several Judges and Justices to Hear, Try and Determine, according to the Laws, Statutes and Ordinances and reasonable Customs of *England*, and of this *Province*, or to such other Words as have relation thereto, and that they shall immediately make Report to the House of any Alterations that shall at any Time happen in such Commission, and likewise to have regard, as near as may be, to observe wherein they differ from the forms of the several sorts of Commissions to the Judges and Justices in England.

Likewise, *Resolved*, That it be an instruction to the said Committee to inspect the forms of the oaths of office that have been and now are usually taken by the several Magistrates; and that in case the following clause be not inserted in the said oath, it be reported to the House, such clause being agreeable to the oath taken by the

Judges in England and resolved to be necessary here, viz:

"To do equal Law and Right to all the King's "Subjects, Rich and Poor, and not to delay any "Person of Common Right for the Letters of "the King, the Lord Proprietary or of any other "or for any other cause. But if such Letters "come to them, they shall proceed to do the Law "the same Letters notwithstanding."

The Duty of the Clerk of the Assembly.

And that Copy of these Resolves be made and given to the Said Committee when they first go out, every Sessions; and that making and giving such Copies be the undoubted Duty of the Clerk of this House, and within the Purview of his Oath.

Maryland Not Conquered but Acquired.

Resolved also, That this Province is not under the Circumstances of a Conquered Country; that if it were the present Christian Inhabitants thereof would be in the Circumstance, not of the Conquered, but of the Conquerers, It being a Colony of the English Nation, encouraged by the Crown to transplant themselves hither for the Sake of improving and enlarging it's Dominions, which, by the Blessing of God upon their Endeavours, at their own Expence and Labour has been in great Measure obtained.

And How.

And 'tis unanimously *Resolved* That whoever shall advance, That His Majesties Subjects by such their Endeavours and Success, have forfeited Any Part of their *English Liberties*—are ill Wishers to the Country and mistake it's happy Constitution.

Resolved also, That if there be any Pretense of Conquest, it can be only Supposed against the Native Indian Infidels, which Supposition cannot be admitted, because the Christian Inhabitants purchased great Part of the Land they at first took up from the Indians, as well as from the Lord Proprietary, and have ever since Continued in an amicable Course of Trade with them except some partial Outrages and Skirmishes which never amounted to a General War, much less to a General Conquest, the Indians yet enjoying their Rights and Privileges of Treaties and Trade with

the *English*, of whom we yet frequently purchase their Rights of such Lands as we take up—as well as of the Lord Proprietary.

Resolved further, that this Province hath always, hitherto, had the Common Law, and such general Statutes of England as are not restrained by Words of local Limitation in them and such Acts of Assembly as were made in the Province to suit its particular Constitution as the will and standard of its Government and Judicature, such Statutes and Acts of Assembly being Subject to the like Rules of Common Law or Equitable Construction, as are used by the Judges in Construing Statutes in England, which happy Rules have by His Majesty and His Royal Ancestors, and also by his Lordship and his Noble Ancestors, or some of them, been hitherto approved, by having the Commissions of Judicature to include Directions of that Nature to the several Judicial Magistrates, unless those words have at any time been casually or carelessly omitted by the Officers, in this Province, that drew such Commissions. That, therefore whoever shall advise his Lordship, or his Successors, to Govern by any other Rules of Government, are evil Councillours, ill wishers to his Lordship, and to our present happy Constitution, and intend thereby to infringe our English Liberties, and to frustrate in great Measure, the Intent of the Crown—by the Original Grant of this Province to the Lord Proprietary.

Resolved further that the foregoing Resolutions of the House are not occasioned by any Apprehension that the Lord Proprietary has ever infringed, or ever had any Intention to infringe the Liberties or Privileges of the People, or to Govern otherwise than according to the Usage and Custom of the Country since the first Settlement thereof, but meerly to assert their *Rights* and *Liberties*, and to transmit their Sense thereof, and of the Nature of their Constitution to Posterity, without the least design of reflecting upon any person whatsoever.

Ordered That the Copy of the Several Resolves of the 25 Instant be made out—which was accord-

ingly done, and sent to the Upper House by Col. L. and Mr. H. with the following Message, viz.:

[By the Lower House of Assembly.]

October the 31st, 1722.

May it please your Honours:

This House having made the several Resolves herewith sent, have thought fit to Communicate them to your Honours.

Signed per order—

M.J. Cl. Lo. Ho.

APPENDIX II.

THE

RIGHT

OF THE

Inhabitants of *MARYLAND*

TO THE

Benefit of the *ENGLISH* Laws.

Oh Liberty! Oh Servitude! How amiable, how detestable are the different Sounds! Liberty is Salvation in Politics, as Slavery is Reprobation; nor is there any other Distinction, but that of Saint and Devil, between the Champions of the one, and of the other.

CATO.

ANNAPOLIS: Printed by *W. Parks*, MDCCXXVIII.[1]

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(1) Reprinted by the kind permission of the Council of the Maryland Historical Society.

p.iii TO ALL TRUE PATRIOTS, AND SINCERE LOVERS OF LIBERTY.

Gentlemen,

The following Sheets are not made publick, because the Author of them is fond of appearing in Print; but because the Representatives, of the People of Maryland, whose Request, bears the weight of a Command, with him, desired they should be publish'd. The Design is *honest*, and what every Body ought to wish, had been undertaken by a Person more *equal* to it; that the Right contended for, might have appeared in its *proper* Lustre; and all Objections to it,

p.iv have been obviated, as I am firmly persuaded they may be. For my *own Part*, I shall think my Time very well spent, if the Objections, with which I expect this *weak* Performance will be encount'red; or a *generous* Concern, to see so *good* a Subject, so weakly managed, excites some able Lover of Liberty, to establish the Truths, which I have faintly endeavour'd to establish. I heartily wish this may happen, as well as every Thing else, conducive to the Prosperity of the Province of Maryland; and am, very sincerely,

Gentlemen,
Your most Obedient, and
Faithful, Humble Servant,

D. DULANY.

p.1 THE RIGHT OF THE INHABITANTS OF MARYLAND, TO THE BENEFIT OF THE ENGLISH LAWS.

As there has been a pretty warm Contest, concerning *The Right of the Inhabitants of* Maryland, *to the Benefit* of the English *Laws;* as well *Statute* as *Common:* And as the Matter is in Dispute, and it is of the utmost Consequence to be at a Certainty about it; It behoves every Man, that has any Regard to, or Interest in the Country, to use his utmost Endeavour to put it in a true Light: For as *Laws* are absolutely necessary, for the good Government, and Welfare, of Society, so, it is necessary, that People should have some Notion of those Laws, which are to be the Rule of their Conduct; and for the Transgression of which, They will be liable to be punished, notwithstanding their Ignorance. If this be necessary? as without Doubt it is; Then it is certainly of the greatest Importance to know, whether a People are to be governed by *Laws*, which their *Mother-Country* has experimentally found, to be beneficial to Society, and adapted to the Genius, and Constitution of their Ancestors; or to compose a new Set of *Laws*, which will be attended with very great Difficulties; and an Expence, vastly disproportionable to the Country, in its present Circumstances. Or

p. 2 whether, They are to be governed by the Discretion, (as some People softly term the *Caprice*, and *Arbitrary Pleasure*,) of any Set of Men.

This, or the like Enquiry, cannot be of any great Moment, but to those that are Free: For, such as have the Misfortune to be in a State of Bondage, are in the Condition of *The Ass in the Fable;* sure to be as heavily laden as they can possibly bear, without rendring them useless to their Masters.

But the *People of Maryland* are *Freemen*, and will certainly continue to be such, as long as they enjoy the Benefit of Laws, calculated for the Security of Liberty, and Property, and the Rights of Mankind: But should They be so infatuated as to give up, or so miserable as to forfeit, (which God forbid!) the Benefit of such Laws; They may then, bid adieu to all the Security They have, of enjoying with any Degree of Certainty, anything, however dear, and valuable.

The Considerations put Me upon enquiring, in the best Manner, my very weak Capacity, and other Disadvantages, would admit of, into the Right, which the People of Maryland have, to the Enjoyment of English Liberties; and the Benefit of the English Laws: Which I take to be, and hope to prove are, convertible Terms. In which Enquiry, I have found very good Reasons, (at least, They seem so to Me,) to convince Me, that the said People have such Right.

To the End, therefore, that I may be undeceived, if I am mistaken; or That I may confirm others, in the Truth, and Reasonableness of what I contend for; as well as the mighty Advantage it is of, to the Inhabitants of this Province, I will endeavour to prove the Right.

p. 3 I. As the People are English, or British Subjects, and have always adhered to, and continued in their Allegiance to the Crown.

II. As the Rights of English, or British Subjects, are granted unto Them, in the Charter of the Province, to the Lord Proprietary.

But before I proceed to treat of these several Rights, it will not be amiss, to observe, that the Law of England consists of the Common and Statute Laws. That the Common Law, takes in the Law of Nature, the Law of Reason, and the revealed Law of God; which are equally binding, at All Times, in All Places, and to All Persons. And such Usages, and Customs, as have been experimentally found, to suit the Order, and Engagements of Society; and to contain Nothing inconsistent with Honesty, Decency, and Good Man-

ners; and which by Consent, and long Use, have obtained the Force of Laws.

The Statute Law, consists of such Acts of Parliament, as have been made from Time, to Time, by the whole Legislature; some of which, are declaratory, or alter the Common Law; I mean, such Part of it as consists of Usages, and Customs, that received their Force and Sanction from the Consent of the People; when those Usages, and Customs, have been mistaken, misapplied, or found to be unsuitable to the Order, and Engagements of Society, in order to make the whole Body of the Law, best answer the true End of all Laws, the Good and Safety of the People.

Some, have restored the People to the Rights, that were theirs, by the Common Law, (which contained nothing inconsistent with General Liberty and Property,) and which ill Men, had at Times, invaded, and infringed; and have made New Barriers, (if I may so speak,) to prevent future Infringements

p. 4 of the like Nature; and paved out a certain, determinate Path, for every Subject, suffering Violence, and Oppression, to be remedied; And taken Care to make it the Interest as well as it ever was, and ever must be, the indispensible Duty of the Magistrate, to allow the Subject, the Benefit of the Law; by rendering the Magistrate himself punishable, if he should neglect, so essential a Part of his Duty.

Some Statutes, are Introductory of new Laws, which may be divided, into such as are by the Words, or Subject Matter of them, of general Use and Extent; such as are more confined; and such, as are made for particular Ends, and Purposes. I shall have Occasion to treat of the first of These, only.

This Law, of England, is the Subject's Birth-Right, and best Inheritance; and to it, may be justly applied, what the great Oracle of the Law, the Lord Coke, saith of the Common Law. "Of Com-"mon Right, that is, by the Common Law; so called, because this "Common Law, is the best and most Common Birth-Right, that "the Subject hath, for the Safeguard and Defence, not only of his "Goods, Lands, and Revenues; but of his Wife, and Children, his "Body, Fame, and Life, also.

(I) 'Tis this Law, that will effectually secure every Honest Man, who has the Benefit of it, in his Life, the Enjoyment of his Liberty, and the Fruits of his Industry. 'Tis by Virtue of this Law, that a British Subject, may with Courage, and Freedom, tell the most daring, and powerful Oppressor, that He must not injure him, with Impunity. This Law, uprightly and honestly applied, and administered,

will secure Men from all Degrees of Oppression, Violence, and Injustice; it tells the Magistrate what he has to do, and leaves him little Room, to gratify his own Passion, and Resentment, at the Expence of his Fellow-Subject. It suits the Degrees of Pun-

(1) I. Inst. 142.

p. 5 ishment, to the Nature and Degrees of Offences, with a due Regard to the Circumstances of Aggravation and Extenuation; as well as to the Frailties and Infirmities of Human Nature. 'Twas of this Law, that it was truly said, by an honest, bold Patriot, an hundred Years since, in Parliament; "Our Laws, which are the Rules of "Justice, are the Ne plus ultra, to King, and Subject; and as They "are the Hercules Pillars, so are they the Pillar to every Hercules, "to every Prince, which He must not pass. (2)

It was upon the Foundation of this Law, that it was resolved in the House of Commons, in March, 1628, Nemine contradicente,

I. "That no Freeman ought to be detained, or kept in Prison, "or otherwise restrained, by command of the King, or of the Privy "Council, or any Other, unless some Cause of the Commitment, "Detainer, or Restraint, being express'd, for which, by Law, He "ought to be committed, detained, or restrained.

II. "That the Writ of Habeas Corpus, may not be denyed; but "ought to be granted to every Man, that is committed, or detained "in Prison, or otherwise restrained, though it be by command of "the King, the Privy Council, or any other; He praying the same.

III. "That if a Freeman be committed, or detained in Prison, "or otherwise restrained, by the Command of the King, the Privy "Council, or any other; no Cause of such Commitment, Detainer, "or Restraint being expressed, for which by Law, he ought to be "committed, detained, or restrained; and the same be returned, upon a Habeas Corpus granted for the said Party; then He ought to be delivered or bailed.

(2) Mr. Creswell's Speech, March, 1627; Rushworth's Collections, Vol. 1, p. 506.

p. 6 "That it is the antient, and indubitable Right of every Freeman, "that He hath full and absolute Property, in his Goods and Estate; "that no Tax, Tallage, Loan, Benevolence, or other like Charge,

"ought to be commanded, or levied, by the King or any of his Min-
"isters, without common Consent, by Act of Parliament. (3)

And this Law is not to be altered, but by the whole Legislature, and we may as reasonably apprehend, that a whole People will be seiz'd with a Delirium, as fear such a Change.

Having given this Short Account of the Law itself, which I hope will not be thought altogether useless, I shall now proceed, in the Method I proposed, of proving the Right, of the Inhabitants of Maryland, to the Benefit of English Laws.

I. As they are English, or British Subjects; and have always adhered to, and continued in their Allegiance to the Crown.

The First Settlers of Maryland, were a Colony of English Subjects, who left their Native Country, with the Assent and Approbation of their Prince; to enlarge his Empire in a remote Part of the World, destitute of almost all the Necessaries of Life, and inhabited by a People, savage, cruel and inhospitable: To which Place, they (the first Settlers,) transported themselves, at a great expence; ran all the Hazards, and underwent all the Fatigues incident to so dangerous and daring an Undertaking; in which Many perished, and Those that survived, suffered All the Extremities of Hunger, Cold and Diseases. They were not banished from their Native Country, nor did They adjure it.

It pleased God, in process of Time, that some of those People, their Posterity, and others that followed, met with such Success,

(3) Rush I. B. 513.

as to raise a Subsistence for Themselves; and to become very beneficial to their Mother-Country, by greatly increasing its Trade and Wealth; where-in, They have been as advantageous to England, as any of Her Sons, that never went from their own Homes, or underwent any Hardships; allowing for the Disparity of Circumstances. And it cannot be pretended, that ever They adhered to the Enemies of their King or Mother-Country; departed from their Allegiance, or swerved from the Duty, of loyal, and faithful Subjects: These are Truths, too evident, and too well known to be denied, by any One, that has the least Share of, or Regard to, Truth, or Common Honesty.

This being the Case of the People of Maryland, it will not be amiss, to observe the Opinions of the two great Civilians, and Politicians, Puffendorf, and Grotius, in Relation to Colonies: The first, says, "That Colonies may be, and often are, settled in different

"Methods: For, either the Colony continues a Part of the Com-
"monwealth It was sent from; or else, is only to pay dutiful Respect
"to the Mother-Common-wealth, and to be in Readiness to defend
"and vindicate its Honour.

(1) Maryland is undoubtedly a Part of the British Dominions, and its Inhabitants are Subjects of Great Britain, and so are They called, in several Acts of Parliament.*

And Grotius faith, "That Such, enjoy the same Rights of Liberty "with the Mother City. (2) And again, in another Place, "For they "are not sent out, to be Slaves, but to enjoy equal Priviledges, and "Freedom." (3) Thus far these great Men.

(1) Law of Nature and Nations, B. 8, Chap. II. 8. 6. * 12 Car. 2. Cap. 34. 15 Car. 2. Cap. 7. Sect. 5. 25 Car. 2. 11 and 12 W. 3 Cap. 12

(2) Grotius of the Rights of War and Peace B. I. Cap. 3. S. 21. (3) B. 2 Cap. 9. 8. 10.

p. 8 It is an established Doctrine, that Allegiance, and Protection, are reciprocal; and that a Continuance in the One, entitles the Subject to the Benefits of the Other: "As the Ligatures, or Strings, (says "Lord Coke) do knit together the Joints, of all the Parts of the "Body, so doth Legiance join together, the Sovereign, and all his "Subjects. (4) For as the Subject oweth to the King, his true and "faithful Legiance, and Obedience; so the Sovereign is to govern "and protect the Subject. (5) Between the Sovereign, and the Sub-"ject, there is a double and reciprocal Tie; for as the Subject is "bound to obey the King, so is the King bound to protect the Sub-"ject. (6) And Subjection draws to it Protection, and Protection Subjection. (7)

Every Subject has a Right to the Enjoyment of his Liberty and Property, according to the established Laws of his Country; when that Right is invaded, Recourse must be had to the Law for a Remedy: And a Man, who hath the Benefit of the Law, is sure to have Reparation for any Injury that has been done Him; and is secure against future Wrongs: But, if he has not the Benefit of the Law, he must not only submit to past Injuries, if done by a Person Superior to him, in Power; but be exposed to future Insults, whenever Power, and Inclination, concur to oppress Him: From whence,

(4) 7 Co. Rep. 4. b. (5) ibid. 5. a Regere et protegere subditos suos. (6) Duplex et reciprocum Ligamen, quia sicut Subditus Regi tenetur ad Obedientiam ita Rex Subdito tenetur ad Protectionem. 4 Co. Rep. 5. a. (7) Protectio trabit Subjectionem, Subjectio Protectionem ibid.

it necessarily follows, that the greatest Advantage, which the Subject can possibly derive, from the Royal Protection, is the Benefit of the Laws; that so long as the Subject hath That, he is secure of every Thing which belongs to Him; that when He loses It, He loses every Thing; or at best, hath but a very uncertain, and precarious Tenure, in any thing: This Subjection, and this Protection, are not bounded by any Space, less extensive than the British Dominions.

p. 9 This, Reason speaks loudly, and Numbers of Authorities are not wanting to confirm; tho' I intend, to confine myself to One, which is the Case of St. Paul;* which is so well known that a particular Recital of the Text is needless; and therefore I shall only observe, that the Apostle claimed the Benefit of the Roman Law, not because, he was born in Rome, or Italy; or indeed, in Europe; for he was born in Asia: Nor did he claim the Priviledge of a Roman, in Rome, Italy, or Europe; but in Judea: There was no Dispute of his Right, because he was born in a remote Province of the Empire; There was no Pretence, that the Laws which were securitative of the Roman's Rights, were confined within narrower Limits than those of the Roman Dominions. Instead of any Pretence of this Kind, the Roman Captain, was afraid of being called to an Account, for having violated the Roman Law, by inflicting a Punishment, that it did not allow of, on a Person, entituled to the Benefit of that Law; And that, as hath been already observed, in a very remote Corner of the Empire.

The Province of Maryland, is as much a Part of the British Dominions, as Tarsus the City, or Cilicia the Country, of St. Paul's Birth, was Part of the Roman Empire: And consequently, a Man, born in Maryland, hath as good a Right, to demand the Benefit of the Laws of his Mother Country, as the Apostle had, to demand the Privileges of a Roman. One would be apt to think, that if there was any Difference, in the two Cases, the Marylander, would have much the better of it; for his Ancestors were English, and St. Paul's Ancestors were not Romans. In a word, the People of Maryland, are not out of the Reach of their Prince's Protection, nor so foolish, or wicked, as to disown their Allegiance, to the best, and most gracious of Kings. What the Learned Mr. Locke, says of natural Equality, being I conceive, applicable to the present Purpose, I am certain it will be

* Acts Chap. 22. V. 25, &c.

p.10 very acceptable; "A State of Equality, (says that great Man) "wherein all Power and jurisdiction, is reciprocal; no one having "more than another: There being nothing more evident, than that "Creatures, of the same Species, and Rank, promiscuously born, to "all the same Advantages of Nature, and the Use of the same Fac-"ulties, should also be Equal, One, amongst another, without Sub-"ordination, or Subjection; unless, the Lord, and Master of them "All, should, by any manifest Declaration of his Will, set One "above Another, and confer on Him, by an evident and clear Ap-"pointment, an undoubted Right, to Dominion, and Sovereignty.†

Can any Thing be more evident, than that All the Subjects, of the same Prince, living within his Dominions, adhering to their Allegiance, and in a Word, behaving themselves, as dutiful and loyal Subjects ought, and promiscuously born under the same Obligation of Allegiance, Obedience, and Loyalty to their Prince, and to the same Right of Protection, should also be entitled to the same Rights, and Liberties, with the rest of the Subjects, of the same Prince, of their Degree, and Condition. Or can anything be more clear, than that Subjects, having an equal Right to Priviledges, must also have an equal Right to the Laws, made to create or preserve such Privileges? And without which, they cannot be preserved; unless the supreme Power, by any manifest Declaration, distinguish some Subject from Others, by depriving some, of their Privileges; and continuing them to Others.

If the People of Maryland are thus unhappily distinguished, they must submit. But if on the contrary, They have a Right, in common with the rest of their Fellow Subjects, to English Liberties, and Privileges. 'Tis absurd to say, They have not a Right to the Means of preserving them.

† Locke of Civil Government. Chap. 2. Sect. 4.

p.11 By what hath been, and will be said; I hope, that the Right of the People of Maryland, to the Benefit of the Laws of England, is, and will be evidently proved; and that it will be likewise proved, that That Benefit, is of infinite Advantage, to any People, who receive the same, in the full Extent of it. If so, it will necessarily follow, that to deprive the People, of the Advantages, derivative from the Laws of their Mother Country, would be greater Injustice, and Oppression, than they could suffer in any particular, or indeed in many Instances; by so much, as the necessary, and only

Means, to secure Men in all their Rights, is of greater Consequence, than any particular Part of their Property.

I have heard of some Men, who have advanced, that the People of Maryland, have a Right to English Liberties, but not to English Laws; and wonder, Why there should be so much to do about those Laws! When we may do as well without, as with them. Such Notions are the Effect of Ignorance, in some and of something worse in Others: And, (as I hope to prove,) are big with Absurdity: All the Rights, and Liberties, which the British Subject, so justly, values Himself upon; are secured to Him, by the British Laws: And when, and as often as those Rights and Liberties, are invaded, Recourse must be had to the Law, for Reparation: Right, and Remedy, are inseparable; and when the latter ceases, the former is extinguished the same Instant. "A Man (saith a great Lawyer,) hath no Right to any Thing, for which the Law gives no Remedy. (1)

It was held by as great a Judge, as ever sate in Westminster Hall, clearly; "That a Devisee, might maintain an Action, at Common "Law, against a Ter-tenant, for a Legacy, deviled out of Land; "for, where a Statute, as the Statute of Wills,

(1) Vaughan's Reports 253.

p. 12 "gives a Right, The Party, by Consequence, shall have An Action "at Common Law, to recover it. (2) The same Judge, held that it "was a vain Thing, to imagine, there should be a Right, without a "Remedy. Want of Right, and Want of Remedy, are Termini convertibles. (3) And of the same Opinion was a former Judge, (4) And there never was One of a contrary Opinion.

It is very evident to every Man's Reason, without any judicial Decision, or other Authority, That to have a Right to a Thing, without any Means or Remedy to maintain that Right, is of no Service. And it is well known, that in all civil Governments, the only certain, and just Remedy, is the Benefit of the Law. Of this, some that advance the foregoing Notions, are aware; but they very well know, that it ought to be carefully concealed, from Those, that they would impose their destructive Doctrines upon, as Orthodox.

Others are so good natured, as to allow the People of Maryland, the Benefit of the Common Law; but contend stiffly, that they have no Right to any of the Statutes; and that having the Liberty of supplying that Defect, by making Act of Assembly, to suit all their

(2) Holt and F. Salkeld's, Rep. 415. Vol. I.
(3) 6 Mo. Rep. 53. the great Case of the Aylesbury Men. (4) 6 Co. Rep. 58.

Purposes; or even, of Re-enacting such of the Statutes themselves, as may be convenient for them, they have no Occasion for the Statutes at All; Whence then, say they, these Apprehensions of wanting Laws? 'Tis only the Statute Law you have no Right to, nor Occasion for. As to the Power of Legislation, I shall say something hereafter.

What I contend for, is, that we derive our Right to British Liberties, and Privileges, as we are British Subjects: That as such, We have a Right to all the Laws, whether Statute, or

p.13 Common, which secure to the Subject, the Right of a Subject, as inseparably incident to those Rights; that the Right to the Liberties, and Privileges; and the Benefit of the Laws, have the same Foundation: And therefore, If we may be deprived of any Part of that Right, without our Consent, or our being convict of any Crime, whereby to forfeit it? We may, by the same Reason, and Authority, be deprived of some other Part; and this, will naturally render the Whole, uncertain; and our Lives, Liberties, and Properties, Precarious.

I have no Notion of a Certainty, in any Thing, that I hold by so slender a Tenure, as the Will of another; but think it vain, and arrogant, to call it Mine.

Those, that would vouchsafe Us the Benefit of the Common Law, but would entirely deprive Us of the Benefit of any of the Statutes, would leave Us in a poor Condition, with Regard to our Liberties: For all the Rights, which the English Subject was entitled to, by the Common Law, were at Times, invaded by Men of Power, and Authority; and the very Invasions themselves called by the Iniquity of Men, and Time, the Law of the Land: And that very Law, which was calculated, and instituted for the Defence, and Safeguard, of Property; preverted to the Destruction of Property. By the Law of Nature, All Men were equal; and by that Law, the Law of Reason, and the Revealed Law of God, Men are enjoyned, to treat One Another, with Humanity, Justice, and Integrity.

Yet, such has been, and is, the Depravity of Human Nature; and so little, has the Love of Equity, and Justice, prevailed among Men; that the excellent Rules, which the Laws already mention'd dictate, have not been sufficient to keep them, within just Bounds, or to restrain them, from treating one Another, with the greatest Cruelties imaginable: Whence, it became absolutely necessary, to make some further Provision by positive Laws;

p.14 such as our Statutes, to oblige Men, to comply with, what the Love of Justice would not, but the Fear of Punishment, might induce them to comply with, and to punish the Disobedient, and Refractory. All which have been found by Experience, to be little enough, to keep Ill Men, in Order; or secure Good Men, from Violence, and Oppression. This hath been the Case, in England itself; A Nation, that has abounded, with Men of great Abilities, great Interest, and opulent Fortunes; that were Patrons of Liberty, Lovers of Justice, and such as preferr'd the Good of their Country to All their own particular Concerns: And that were therefore, Checks to Oppressors, and Violators of Laws, and the Rights of Mankind: Yet the Virtue, Resolution, and Endeavours of these Worthies, were not sufficient, to secure themselves, or their Fellow Subjects, in the Enjoyment of their Rights and Liberties; or the Law, from being polluted by Ill Men, in Authority; or turn'd to the Destruction of the Best, for opposing the Ruin of their Country. That this, hath often been the Case in England, everybody knows, who is at all acquainted with its History; and I believe it has been so, in all other Nations. Such calamitous Circumstances, were not to be born, by a Free-People, who were possessed of the Means, to provide for their own Safety.

Magna Charta was made, which as all eminent Lawyers agree, is, and indeed, by the Words of it, appears to be, A Declaration of the Common-Law: † The 29th Chapter is not long, and ought to be read by every Body, and (in my humble Opinion,) taught to Children, with their first Rudiments; the Words of it are, "No Freeman shall "be taken, or imprisoned, or disseised of his Freehold, or Liberty, "or free Customs; or outlawed, or exiled, or any way destroyed: "Nor (says the King) will we pass sentence upon him, but by lawful "judgment of his peers or by the law of the land:

† I Inst. 81.

p.15 "To None will we sell; To None will we deny; To None will we "defer Justice, or Right." If new Rights, or Liberties were granted, they would be particularly granted; and there would be no Occasion to refer to the Laws of the Land.

By another Statute, Subsequent to Magna Charta, it is provided "That no Man, of what Estate, or Condition that he be, shall be put "out of Land, or Tenement; nor taken, nor imprisoned, nor disin-"herited, nor put to Death, without being brought into answer, by "due Process of Law." (a) This Statute, directs no new Process of Law; and enacts over again, what seems to have been provided for,

(a) 28 Edw. 3, cap. 3.

by Magna Charta, which was in full Force, when this Statute was made.

By another Statute, made but Fifteen Years after the last, and in the same Reign: It was assented to, and accorded for the good Government of the Commons; that no Man, be put to answer without Presentment before Justices, or Matter of Record, or by due Process, or Writ Original; according to the old Law of the Land. (b) To recite but a very small part, of all the Statutes, that have been made, to confirm, and establish the Subject's Rights, and Liberties that were his, by the Common Law, would be too tedious: I shall therefore, confine myself to a few Instances: In the Preamble, and several Parts of the Body, of the Petition of Right; a great Number of Statutes are mentioned, that confirm'd the Subject's Right, in his Liberty and Property; which were then in Force, and yet had all been violated: (c) Wherefore, it was thought necessary, to declare against the Violation; and establish the antient Rights, in a Parliamentary way, which was accordingly done.

In the Sixteenth Year, of the Reign of King Charles I. very great Complaints were made of the Star-Chamber, and Council-Table, That the Judges of the former, had not confined themselves

(b) 43 Edw. 3. cap 3. (c) 3 Car. I. C. I.

p. 16 to the Points, limited in the Statute of H. 7. C. I. which impowered the Great Officers of the Crown, and other Great Men, to proceed and punish some particular Offences; "but had undertaken to punish, where no Law did warrant, and to make Decrees for Things, having no such Authority; and to inflict heavier Punishment than by any Law was warranted: That the Proceedings, Censures, and Decrees, of that Court, had been found by Experience, to be an intolerable Burthen to the Subject, and the Means to introduce an arbitrary Power and Government: That the Council-Table, had of late Times, assumed to itself, a Power to intermeddle in civil Causes, and Matters only of private Interest, between Party and Party, and had adventured to determine of the Estates, and Liberties of the Subject, contrary to the Laws of the Land, and the Rights and Priviledges of the Subject." The Court of Star-Chamber was entirely dissolved, as were several other Courts; and the following, ample, Parliamentary Declaration made: "Be it enacted and declared by Authority of this present Parliament, that neither his Majesty, nor the Privy Council, have, or ought to have, any jurisdiction, Power, or Authority, by English Bill, Petition, Articles, Libel, or any other arbitrary way whatsoever, to examine, or draw into Question, determine, or dispose of, the

"Lands, Tenements, Hereditaments, Goods, or Chattels, of any of "the Subjects of this Kingdom; but that the same, ought to be "tryed, and determined, in the ordinary Courts of Justice, and by "the ordinary Course of the Law." *Great Officers transgressing this Law, are liable to severe Penalties.

The Preamble to the Habeas Corpus Act, shews, what Shifts, and Evasions, were used, to elude the Force of the Laws, that were instituted, to secure the Subject's Liberty; the Words

(*) 16 Car. c. 10.

p.17 are: "Whereas, great Delays have been used, by Sheriffs, Goalers, "and other Officers; to whose Custody, any of the King's Subjects, "have been committed, for criminal, or supposed criminal Matters; "in making Returns, of Writs of Habeas Corpus, to them directed; "by standing out an Alias, Pluries Habeas Corpus; and sometimes "more, and by other Shifts, to avoid their yielding Obedience to "such Writs; contrary to their Duty, and the known Laws of the "Land; whereby many of the King's Subjects, have been, and here-"after may be, long detained in Prison, in such Cases, where by the "Law they are bailable; to their great Charges and Vexation. (I) Therefore, Provision is made, to oblige all Officers to perform their Duty, and to punish such as shall not do so. There is no Part of the Royal Prerogative, abridged, or retrenched by these Statutes; no new Liberties, or Priviledges are granted to the Subject. Here are ample, and large Declarations in Parliament, of the Subject's Rights; loud Complaints of the Violation of those Rights; The Rights, themselves, confirmed; and the knavish Chicanes, and crafty Inventions, that were introduced to deprive the Subject of his Rights, are abolished; and more easy, plain, and direct Ways, for the Subject, to come at the Benefit of Laws, established in their Room.

By the first Act for settling the Succession of the Crown, a Parliamentary Declaration, of the Rights, and Liberties of the Subject, was thought necessary; not because the Subject had forfeited his Rights, and Liberties; or demanded new: But because, those that antiently belonged to him, had been invaded, and violated.*

From what hath been said, it is evident; that the English Subject, had very ample Rights, and Privileges, by the Common Law; and it is manifest by the several Statutes already mentioned;

(I) 31 Car. 2. C. 2. (*) 1 W. & M. C. 2.

p.18 and a Multitude of others, as well as the English History; that the Common Law, though frequently confirmed in Parliament, was not sufficient, to secure Him from Oppression, and Violence: And there is no other Remedy, when Laws are violated, but to punish the Violators, and establish, and confirm the Laws; which have been frequently done, and sometimes with great Difficulty, and the Expence of a great deal of Blood, and Treasure. Whoever has read the Parliamentary Proceedings, in the Last, as well as Queen Anne's Reign; will find, that when the Safety of the Government, rendered a temporary Suspension of the Execution of the Habeas Corpus Act necessary; it was always opposed, when proposed to be of any considerable Duration: And the longest Time of Continuance of any of those Acts, that I ever saw, was not above 18 Months; so careful has the British Parliament been, to preserve to a People, justly fond of Liberty, and wisely jealous, of everything, that might be destructive of, or hurtful to It; the Benefit of a Law, that is a great Support and Preservative of Liberty. This shews, that the British Subjects, esteem the several Statutes, that have been made to confirm their Common Law Rights, to be of mighty Consequence, and Advantage to them: And any one, may well imagine, that if any Attempt should be made, to abrogate those great Defences and Bulwarks of the People's Liberty; everybody would be alarmed, and dread the Introduction of the same, or greater Mischiefs, than those, that render'd the making so many confirmatory Acts necessary: And it would be stupid, and irrational, to think the contrary. If then, the Case was, as hath been already mention'd, in England? That, notwithstanding its Common Law, entitles the People, to ample Liberties and Priviledges; that there were great Numbers of brave, honest Patriots, who understood the Laws

p.19 of their Country, perfectly well, and who never fail'd to use their utmost efforts, in Opposition to every Violation of that Law; that notwithstanding all they could do, themselves, and others, were insecure in their Lives, Liberties, and Properties; and Things were brought to such Extremities, that it became necessary, to confirm, and strengthen, the antient Rights by the Legislative Authority: And that, although That was frequently done, yet Oppressions were frequently renewed, and wicked Men in Power, always found Pretences, to oppress those, that would not abett, or would oppose their Crimes; and they have never wanted Instruments, to execute all their villainous and destructive Schemes.

Let us consider our own Circumstances, and enquire, Whether

the Number, Ability, Interest, or Fortune, of our Patriots bear any Proportion, to those that England has been blest with, in all Ages. Whether we are greater Lovers of Justice, and Equity, than other People, or have less Occasion for Laws, to restrain those that are unruly amongst us, and to secure and protect those that are peaceable, and innocent, than our Neighbors have. And whether Men of the greatest Authority, and Interest among us, may not have as strong Inclinations for Power, and Dominion, and of Lording it over their Inferiors, as we are told Great Men in other Parts of the World have. By a serious Consideration of these Things, we may be able, to form some Judgment, of the Condition we should be in, if we were to forfeit the Benefit of all the Laws, that have been made; I mean, the Statutes to declare the Subject's Right at the Common Law; and to establish, strengthen, and confirm, that Right. "If Men (says an ingenious Author) will be great Knaves, in spight of Opposition; how much greater would they be, if there were none.*

(*) Cato's Letters.

p.20 Some People, will object several Book Cases; wherein the Judges have resolved, that the English Laws did not extend to Ireland; 'till it was expressly enacted that they should: And that the English Acquisitions in France, were never governed but by their own Laws: From whence, the Necessity of enacting the English Statutes, in Maryland, before it's Inhabitants can have the Benefit of them, is often inferred. But this Objection, (I conceive) will be of no great Weight; when it is considered, that those Countries, were inhabited, by civilized, sociable People, conversant with Arts, Learning and Commerce; that had Laws, suited, and adapted to the Order, and Engagements of Society; by which, themselves, and others that went to live among them, might be peaceably, and happily governed: The Cause was wanting here, and so must the Effect be; for Maryland, before it was settled by the English, was. as to Law, and Government in the same Condition, with an uninhabited Wilderness: "And in Case of an uninhabited Country, newly found out, by the "English Subjects; All Laws in Force in England, are in Force there. †

The native Indians, were rude, savage, and ignorant; destitute of Letters, Arts, or Commerce; and almost, of the common Notions, of Right, and Wrong—A People, thus qualified, must make excel-

(†) P. Holt C. 1. 2 Salk 411.

lent Preceptors, for Englishman! and shew, (without Doubt,) worthy Examples, for their Imitation!

In the Dispute between the Earl of Darby, and the Sons of a former Earl, about the Isle of Man, when it was urged, that the English Laws, extended to that Island; it was alledged, and proved, that they were governed by other Laws, which Laws, were shewn in Writing: For which Reason, (I conceive, though the Book is silent in that Particular,) it was adjudged, that the English Laws did not reach the Isle of Man.*

(*) 2 Anderson's Reports. 116.

p. 21 In a Word, it seems clear, that the Reason of the adjudged Cases, turns upon this, that even in the Case of a Conquered Country, the People ought to enjoy their own Laws, until they are actually abrogated, and others instituted in their room, by the Conqueror. This appears plainly in Calvin's Case, † where a Distinction is made between the Conquest of a Christian Kingdom, and the Kingdom of an Infidel. "Upon this Ground, there is a Diversity "between a Conquest of a Kingdom of a Christian King, and the "Conquest of a Kingdom of an Infidel; for, if a King come to a "Christian Kingdom by Conquest, seeing that he hath Vitae [illegible]is "potestatem, he may at his Pleasure, alter and change the Laws of "that Kingdom; but until he doth make an Alteration of those "Laws, the antient Laws of that Kingdom remain." And it appears plainly in History, that some of the wisest, as well as most successful Nations in the World, have been very careful to avoid making such Changes, left they might beget an irreconcileable Hatred between the Victors and Vanquished; whereas, leaving the latter the Use and Benefit of their own Laws, would make them submit, with the less Reluctance, to the Government of their Conquerors; and there is neither Policy, nor Humanity, in making People desperate. "Thus "did the Goths, when they overcame the Romans; * So had the "Romans done, when they conquered the Germans and Gauls: "What would our Empire now have been (says Seneca) if a whole-"some Providence had not intermix'd the Conquered with the "Conquerors. Our Founder Romulus (says Claudius, in Tacitus) "did so prevail by his Wisdom, that he made of those that were "his Enemies, the same Day, his (Subjects and) Citizens; and he "tells us, that nothing contributed so much to the Ruin of the "Lacedemonians and Athenians, as their driving away the Conquered as Strangers. Histories give us Examples of the Sabines, Albans, Latins, and other Italian Nations, till at last Caesar led the Gauls in Triumph, and then entertain'd

(†) Co. R. 17 C. * Grotius of the Rights of Peace and War. B. 3. chap. 15.

p.22 "them at his Court. Cerealis, in Tacitus, thus addresses the Gauls; "You yourselves generally command our Legions, you govern "there, and the other Provinces; you are denied or debarr'd of "nothing: Wherefore love and value that Peace and Life, which the "Conquerors, and Conquered enjoy equally. Polibius admires the "Moderation of Antigonus, that when he had Sparta in his Power, "he left to the Citizens their antient Government and Liberty; "which Act acquired him Praise throughout Greece.

"Thus the Capadocians were permitted by the Romans, to use "what Form of Government they pleased, and many Nations after "the War, were left free. Carthage was left free, to be govern'd by "her own Laws, as the Rhodians pleaded to the Romans after the "2d. Punick War; And Pompey (says Appian) of the Conquer'd "Nations, left some free to their own Laws. Thus the Government continued among the Jews in the Sanhedrin, even after the Confiscation of Archelaus.

"When all Empire is taken away from the Conquer'd, there may "be left them their ordinary Laws about their private and publick "Affairs and their own Customs and Magistrates. Thus Pliny's "Epistles tell us, that in Bithynia, a Proconsular Province, the City "of Apamea was indulged to govern their State as they pleased "themselves. And in another Place the Bithynians had their own "Magistrates, their own Senate. So in Poictus the City of the "Amisni, by the Favour of Lucullus, was allowed its own Laws, "The Goths left their own Laws to the Conquered Romans. We "read in Salust, the Romans chose rather to gain Friends than "Slaves, and thought it safer to govern by Love than Fear. Julius "Caesar told Ariovistus * that Fabius Maximus fairly Conquered "the People of Auvergne and Rouerge, whom he might have re-"duced into a Province, and made Tributaries to the Empire. But "he forgave them

(*) Caesar's Commentaries.

p.23 "and did not doubt, but it might be easily prov'd, upon further "Search into Antiquity, that the Romans had a very good Title to "that Country; But since it was the Pleasure of the Senate they "should remain a Free People, they were permitted the Use of their "own Laws, Government, and Customs." Critognatus, the Gaul, thought he could not use a more favourable or prevailing Argument with his Countrymen, to encourage and unite them against the Romans, than to tell them that the Romans design'd to possess

their Country, and make them perpetual Slaves; and that they never made War upon any other Account. "If you are ignorant (says he) of their Transactions in remoter Countries, cast your Eyes upon the Neighbouring Gaul, which is reduced to a Province, deprived of its Laws and Customs; and labours under an Eternal Yoke of Arbitrary Power.

I have heard it asserted, that Maryland is a Conquered Country; which, by the By, is false; and that the Conquered, must submit, to whatever Terms, the Victor thinks fit to impose on him: Were the Case really so, The Indians, must be the Vanquish'd, and the English the Victors; and consequently, the Indians, would be liable to the Miseries, in which a Conquered People are involved: Otherwise, the Conquerors themselves, must be Loosers by their Courage, and Success; which would be but a poor Reward of their Valour; However gross, and absurd, these Notions appear to be, at the very first View, to every Man of Common Sense; yet, have they been insisted on, with great Confidence, by Men, that have had more Knowledge than Honesty. But suppose even this, to be the Case, that the English, by being brave and successful, had forfeited their Native Rights, and become Slaves by their Acquisition: Yet, even that, as the Case stands, would not reduce them to the Condition, wherein some kind People wish to see them; viz. Being excluded from any Right to, or Benefit from the English Laws. For the Charter

p. 24 of Maryland, does not only contain a Grant of the Country, with several Prerogatives to the Lord Proprietary: But also contains a Grant, to the People, of all the Rights, Privileges, Immunities, Liberties, and Franchises, of English Subjects: Which brings me to the second Thing I proposed: viz. The Right which the People of Maryland, have to the Benefit of the English Laws, by the Charter of the Province, to the Lord Proprietary: The Words whereof, pertinent to the present Purpose, are:—"And We also of our mere "special Grace, injoyn, and constitute, ordain, and command, that "the said Province shall be of our Allegiance; and that all, and "singular, the Subjects, and liege People, of Us, our Heirs, and "Successors, transported, or to be transported, into the said Prov-"ince; and that the Children of them, and such as shall descend "from them, there, already born, and hereafter to be born; shall be "Denizens of Us, our Heirs, and Successors, of our Kingdoms of "England, and Ireland; and be, in All things, Held, Treated and "Esteemed, as the Liege, Faithful People, of Us, our Heirs, and

"Successors, born within our Kingdom of England: And likewise, "any Lands, Tenements, Revenues, Services, and other Hereditaments whatsoever, within our Kingdoms of England, and other "our Dominions, may inherit, or otherwise purchase, receive, take, "have, hold, buy, possess; and them may occupy and enjoy, give, "sell, alien, and bequeath: As likewise, All Liberties, Franchises, "and Privileges, of this our Kingdom of England, freely, quietly, "and peaceably, Have, and Possess, Occupy, and Enjoy, as our Liege "People, Born, or to be Born, within our said Kingdom of England; without Let, Molestation, Vexation, Trouble, or Grievance, "of Us, our Heirs, and Successors; any Statute, Act, Ordinance, or "Provision, to the contrary thereof notwithstanding.

It would be difficult, to invent stronger, or more comprehensive Terms than these, whereby All the Liberties, Franchises, and Privileges, of English Subjects, are granted to the People of Maryland: And this Charter, which I have seen, in the Old Books,

p. 25 of the Council's Proceedings, has been confirmed, by Act of Parliament.

The English Subject, as hath been already mentioned, and proved, (as I conceive,) had an undoubted Right to his Liberties, Franchises, and Privileges, by the Common Law: Yet those Liberties, Franchises, and Privileges, were all invaded, and violated, and Multitudes of good Men were first deprived of the Benefit of the Law, and then exposed to Rapine, and Oppression: These Oppressions, always produced Murmurings, and Discontents, and sometimes Slaughter and Bloodshed; and last of all, Acts of Parliament, to heal the Breaches, that had been made in the Laws; (I) and to establish and confirm the antient Rights of the Subject. The Acts thus obtained, have always been deemed, as essential a Part of the Security, of the Subject to his Rights and Privileges, as the Common Law itself: And, as he was insecure, before they (the Statutes) were made; so would he be rendered, if they were abrogated, or He deprived of the Benefit of Them: For the Benefit of the Laws, is so necessary to support the Liberties, which they were instituted to confirm and establish; That the Abrogation of such Laws, would in Effect, be an Abolition of the Liberties themselves.

Here then, by these Words of the Charter, the Liberties, Franchises, and Privileges of an English Subject, are granted fully, and amply, to the People of Maryland; the Benefit of the Laws, securitative of those Liberties, etc., as inseparably incident to the Liber-

(I) History of Magna Charta, and the Transactions of several Reigns before it, in the Book called English Liberties. p. 8. 9. & 10.

ties themselves, are also granted, by Implication: This is Doctrine, that I am confident, will not be gainsayed by any Lawyer: For these, are established and uncontroverted Maxims: That, when the Law gives a Thing, it gives

p.26 a Remedy to come at it. (2) Things incident, are adherent to the Superior, or Principals. (3)

They, that are to have the Conusance of any Thing, are also, to have the Conusance of all Incidents, and Dependants thereon; for an Incident, is a Thing necessarily depending upon another. (4) When the Law gives a Thing, All Things necessary for obtaining it, are included. (5) When a Thing is commanded to be done, every Thing necessary to accomplish it, is also commanded. (b) So when a Power is given, to do any Act, a Power is therein included, of doing every Thing, without which, the Act could not be compleatly done.

I hope the Passage out of the Charter, the Authorities produced, and the Nature of the Thing; are sufficient, to convince every unprejudiced Person, that if the first Settlers of Maryland, had really lost their native Laws, and Rights, and been in the Condition of a Conquer'd Country; that they, by this Charter,

(2) Lou le Ley done chose, la wo done Remedy avener a seo. 2 Roll's Reports 17. (3) Wingate's Maxims, 127. "If a man be seised of Lands in Fee-simple, and "having divers Evidences and Charters, (some of them containing a Warranty, "and some not,) conveys the Land over to another, without Warranty; upon "which he may vouch; the Purchaser shall have all the Charters, and Evi-"dences; as well those containing the Warranty, as the others: For as the "Feoffer had conveyed over his Land absolutely, and is not bound to Warrant "the Land, so that he might be vouched to Warranty, and to render in Value; "And the Feoffee is bound to defend the Land, at his Peril: For this Case, it "is reasonable, that the Feoffee should have all the Charters, and Evidences, "as incident to the Land; although they be not granted to him, by express "Words." I. Co. R. I. Lord Buckhurst's Case. A Grant of Reversion, includes a Grant of the Rent, by Implication, as incident to the Reversion. I Inst. 151. a. (4) Wingate's Maxims 131. I Inst. 56 a Wood's Inst. 263. "Quando Lex aliquid "alicui concedit, concedere videtur etud, sine quo, res ipsa esse non potest." (5) Upon a Writ of Estrepment, directed to the Sheriff, whereby, He is commanded to prevent any Waste being done; It was resolved, that he might resist all those, that would do Waste, and that, if he could not otherwise prevent them, he might imprison them, and make a Warrant to others, so to do: And that if it were necessary, he might take the Power of the County to his aid—5 Co. R. 115. (b) Quia quando Aliquid mandatur. Mandatur et omne per quod pervenitur ad aliud. 2 Inst. 423.

p.27 are put into the same State, and Condition, that their Fellow Subjects residing in England are in, as to their Rights and Liberties: And, as it is already (I humbly conceive) proved, that the Benefit of the Statute, as well as the Common-Law, is the only Bulwark, and sure Defence of the Subject's Life, Liberty, and Property; I would

ask this one short Question,—How the People of Maryland, can have the Benefit of what is granted them by the Charter, if they are deprived of the Means, viz. The Benefit of All the Laws that are necessary to secure them, in the Enjoyment of what is granted.

It seems very strange to me, that any One in his Senses, should imagine it out of the Prince's Power to treat his Subjects in this remote Part of his Dominions, with Mercy, Clemency, and Tenderness; or to confer so great a Favour on them, as the Laws of their Mother Country: But that he may treat them with Rigour and Severity: This, as strange as it seems, hath been advanced by an eminent Lawyer, as I am inform'd: And others, of less Knowledge, relying (I suppose) on his authority, and Judgement, have given into the same wild Sentiments: I shall use no other Arguments to confute such extravagant Notions, so void of Loyalty, and Common Sense, but a Passage out of the celebrated Mr. Waller's speech, in Parliament; wherein he elegantly exposes some Men's Notions of the Law, not unlike those whom I have been speaking of, in relation to the King's Power: "As if the Law, says he, was in Force for the "Destruction of the Subjects, and not for their Preservation; that it "should have Power to kill, but not to protect them: A Thing, no "less horrid, than if the Sun should burn Us, without lighting Us; "or the Earth serve only to bury, and not to feed and nourish Us! It may, probably, be supposed, that I give up the first Right, I mentioned; by laying so great a Stress on that which is deriv'd from the Charter:—But I am far from it,—For I should think the Right good, had the Charter never been made; as were the

p.28 Rights of English Men, to all the Liberties, confirmed by Magna Charta, and other subsequent Statutes, before they were made: And as the Confirmation of the Subject's antient or Common-Law Rights, by several Acts of Parliament, is very beneficial to the Subject; so the Grant, or Confirmation of the same Liberties by the King, to the People of Maryland, is also very advantageous. It is no new Thing, even in particular Cases, to have a Grant from the King, to a private Person, of a Thing in which he really had a Right, and the King had none.* It hath been objected, that truly,

* The Possessions of the Prior of Shiells, were seized into the King's Hands, because (as it was alledg'd) he was an Alien; Whereupon he sued a Writ of Right to the King; setting forth, that at another Time, he was Prior of Andover; and his Possessions were seized into the King's Hands; although he was the King's Subject, born in Gascoin, within the King's Allegiance: Upon this, the King, of his special Grace, commanded his Escheater to make Restitution; and yet the Judges declared, The King had no Right to seize. So was it done, in the Case of Reniger and Fogasa, in the Commentaries, p. 20. Only, no mention is made of the King's special Grace.

We have a Power of Legislation; that if any of the English Laws, are suitable to the Circumstances of the Province, we may enact them a-new: And from thence, 'tis inferred, that there is no Reason, to contend so much for the English Laws; and, indeed, that we have no Right to them, since we are so amply provided for otherwise. To this I answer,

That the Power of Legislation, granted to the Lord Proprietary, and the People of Maryland, was design'd as a Benefit, and not as a Prejudice: For it could hardly be suppos'd that a New Colony, vastly distant from their Mother-Country, exposed to the Insults of a cruel and savage Enemy; and inhabiting a Wilderness, must not be at a Loss, in some particular Cases, to apply the Rules of the Common Law, or general Statutes; (were they ever so conversant with them,) which happens to be the Case, in Great Britain, itself, and occasions the making of new Statutes, almost every Session of Parliament; and not to

p. 29 have it in their Power to provide suitably to any Emergency, by Laws of their own, would expose them to many Inconveniences; to prevent which, no better Expedient could be thought of, than to grant Them a Power of Legislature, under proper Restrictions. Thus it is in all Corporations; the Members of them, have a Power, with the like Condition, expressed, or implied, that is annext to the Power of Legislation, Granted to his Lordship, the Lord Proprietary, and the Freemen of Maryland, to make By-Laws, for the particular Utility of their own Country. And I believe, no Lawyer, or Man of Sense, ever imagined, that such a Grant, divested those that accepted of it, of the Rights they were born to in Common, with their Fellow-Subjects. Besides, if we consider the prudential Part, it is impossible that We can be ignorant, That the enacting so many New Laws, would take up a vast deal of Time, and occasion a greater Expense, then our Circumstances will admit of: And when all is done, they will not be any better than they are now, nor near so good, unless great Care be taken in transcribing them: And I have the Opinion of a very eminent Lawyer, "That it is never pru-"dent, to change a Law, which cannot be better'd in the Subject "Matter of the Law." * There is another Circumstance, that (as I humbly conceive) is of great Weight, and deserves the most serious Consideration; which is this: Should We attempt to enact such of the English Statutes, as may be supposed to suit the Condition of

* Vaugh. C. I.

the Country, upon a Supposition, that We have no Right to them, without so doing; and that We should miscarry in that Attempt, which is not impossible, it would be such an Argument against the Right we contend for, as we could not easily get over; besides the Danger of its being made a Handle, to overturn a great deal, that hath been heretofore done, by Virtue of the Statutes.

p. 30 Thus, I have endeavoured to prove The Right of the People of Maryland, to the Benefit of all the English Laws, of every kind, that have been instituted for the Preservation, and Security of the Subject's Liberty, from Reason, and Authority; and to represent to my Fellow-Subjects, the great Advantage they derive from the Laws of their Mother Country; and how highly they ought to esteem them.

And I beg leave to add, That Men, from a State of Nature and Equality, formed themselves into Society, for mutual Defence, and Preservation; and agreed to submit to Laws, that should be the Rule of their Conduct, under certain Regulations. Let us suppose the first Settlers of Maryland, to be a Society of People, united and combined together, for mutual Defence and Preservation; and sensible, not only of the Use, but also of the Necessity of Laws, and conscious of their own Incapacity, to make such as might suit their Occasions, and procure their Welfare and Safety: I say, suppose them under these Circumstances, without any Regard to their Rights, as English, or British Subjects, or by Charter: And that they actually agreed, to make the Laws of their Mother-Country, (of which it is to be presumed, they had a general, or at least, some Notion,) to be the Rule of their Conduct, with such particular Provision, as they should, at Times, find necessary to make, in particular Cases: And that upon long Tryal, and Experience, of those Laws; they became convinced, of the Equality, and Justice of them. and consequently, fond of them: Will any one say, that they are obliged, to change those Laws? Or, to have them upon other Terms, than they have always had them, without their own Consent, or the Interposition, of the supreme Authority, of their Mother Country. It is manifest, by the judicial Proceedings, (which my Lord Hale says, make one formal constituent Part of the Law; *) and the Manner of Transferring Property, in

(*) Hale's History of the Law.

P. 31 Maryland, that the People, since the first Settling of the Province, have in all Cases, (some few excepted, which particular Acts of Assembly provided for,) looked upon the Laws of England, as well Statute as Common, to be their Laws, and the Rules of their Conduct. The Tenure, by which they hold all their Land, is Free and Common Soccage; which is a Common-Law Tenure. A great Part, of the most valuable Land in the Province, is intailed, by Virtue of the Statute de Donis. (1) A greater Part, devised by Virtue of the Statute of Wills. (2) And not a little, conveyed by Deeds of Lease, and Release, by Virtue of the Statute, for transferring Uses into Possession. (3) The Statute of Frauds and Perjuries, has always been allowed to affect Devises, not made conformably to it. (4) And as in England, Usages, and Customs, in Process of Time, have obtained the Force of Laws, which they always, afterwards, continued to have, till they were altered, or abrogated by the Legislative Authority; so those Laws, that have been received in Maryland, though the People had no other Right to them, but that Reception, and the long-continued Use of them; ought to have the Force of Laws, until other Provision is made, by the Legislature of the Province.

(1) 13 E. I. c. 1. (2) 32 H. 8. c. 1. 34, 35 H. 8. c. 5. (3) H. 8. 1. 10. (4) 29 Car. c. 3.

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ERRATA.

Page 308, line 7; for "stinkebees," read *stinkebus*.
Page 312, line 12; instead of "for," read *from*.
Page 314, line 29; for "citizens," read *citizen*.
Page 340, note 12.—Since writing this a printed copy of the session laws of 1747 has been found.